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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RICHARD SHUMSKY, Chief Probation Officer,
Los Angeles County,

Petitioner,

v.

EDMUND Y. CHEIN,

Respondent.

On Petition For Writ Of Certiorari
To The U.S Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDMUND Y. CHEIN, Defendant and Appelllant,	B 113514 (Super. Ct. No. BA076453) **COURT OF APPEAL -SECOND DIST. FILED** **JOSEPH A. LANE Clerk C.HON** **[stamp]**

APPEAL from a judgment of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Affirmed.

Cleary & Sevilla and Charles M. Sevilla for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Pamela C. Hamanaka, Supervising Deputy Attorney General, and Roy C. Preminger, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant, Edmund Y. Chein, appeals from his convictions for three counts of perjury. (Pen. Code[1] § 118.[2]) Defendant argues: the testimony of Judge Robert Altman - amounted to a directed verdict and the denial of a fair trial; prosecutorial misconduct denied him a fair trial; there was insufficient evidence to support his convictions; the trial court erred in failing to give a requested jury instruction; and the trial court's failure to instruct on the "delivery" element of the perjury offense in count 4 relieved the prosecution of its burden to prove all elements beyond a reasonable doubt.

DISCUSSION

A. Factual And Procedural Background

Defendant received a bachelor's degree from the University of California in 1971. He attended Cornell University Medical School from 1971 to 1975. Defendant did not graduate from Cornell. Defendant attended Southwestern University School of Law, where he received

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Penal Code section 118 provides in pertinent part: "(a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury...."

a juris doctor degree. He received his medical deg'ee in 1980 from the American University of the Caribbean Medical School. Defendant completed a post- doctoral medical residency at the University of Southern California in 1984. This residency program made defendant eligible to become a board certified specialist in physical medicine and rehabilitation. Such certification did not included orthopedic surgery. Defendant assisted in orthopedic surgery. However, he was not a board certified specialist in orthopedic surgery. In order to become certified by the American Board of Orthopedic Surgery (the board): a physician was required to complete a five-year residency; the five-year residency was to be ig orthopedic surgery; and the doctor was required to serve an additional two years of private practice as an orthopedic surgeon. Only then could the physician become board certified in the field of orthopedic surgery.

When the evidence is viewed in a light most favorable to the judgment *(Jackson v. Virginia* (1979) 443 U.S. 307, 319; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909; *People v. Barnes* (1986) 42 Cal.3d 284, 303), defendant committed perjury while testifying under oath at a civil trial and in interrogatories answers. Defendant testified as a witness offering expert testimony in the civil lawsuit of Frank and Sandra Lopez versus Consolidated Freightways and Joel A. Frederick, Los Angeles Superior Court case No. WEC 105580. Defendant was the treating physician of Mr. and Mrs. Lopez. Mr. and Mrs. Lopez were claiming injuries from an automobile accident. The trial was presided over by Judge Robert Altman. Judge Altman later testified at defendant's perjury trial. Judge Altman testified as to the materiality element of defendant's false testimony at the Lopez trial. At the Lopez trial, defendant testified that he graduated from Cornell Medical School and that he was certified by the American Board of Orthopedic and Neurological Surgery. Defendant

also testified during the Lopez trial that he had only one office location at the time of trial and on October 9, 1989. However, when defendant was deposed in another civil case, he testified that on October 9, 1989, he practiced out of offices in South Gate, Carson, and Long Beach. Defendant registered fictitious business name statements with the Los Angeles County Clerk for seven different orthopedic or neurological medical groups at various locations. Other exhibits introduced at trial demonstrated that defendant misrepresented facts regarding the medical school he attended and the location of his business office. In another civil matter, *Dirk Kancilia v. Edmund Chein*, case No. LC012300, defendant declared and certified under penalty of perjury in response to an interrogatory that he had attended and received a medical degree from the American University School of Medicine in Florida.

B. Judge Altman's Testimony

Defendant argues reversal is in order because Judge Altman's testimony: was irrelevant; exceeded the scope of the issue of materiality; was prejudicially presented as expert testimony; and was tantamount to a directed verdict. Further, defendant argues Judge Altman injected gratuitous comments while subject to cross-examination by defense counsel. We disagree that any of these arguments permits reversal.

1. Constitutional claims

To begin with, we agree with the Attorney General that defendant may not raise any constitutional objections on appeal concerning Judge Altman's testimony. This is because defendant never raised them before the trial judge. The California Supreme Court has repeatedly held that constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal.

(*People v. Williams* (1997) 16 Cal.4th 153, 250 [objection that admission of gang paraphernalia violated defendant's associational - rights under the First and Fourteenth Amendments waived when not presented in trial court]; *People v. Vera* (1997) 15 Cal.4th 269, 274 [defendant precluded from asserting his claim of an ineffectual jury waiver for failing to alert the trial court by a timely objection]; *People v. Padilla* (1995) 11 Cal.4th 891, 971, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823. fn. 1 [failure to request a particular instruction where there is no sua sponte duty to instruct waived due process contention]; *People v.-Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [the defendant's federal constitutional due process, fair trial, reliable guilt determination claims concerning the admissibility of a videotape waived in a capital case when they were not interposed in the trial court]; *People v. Garceau* (1993) 6 Cal.4th 140, 173 [Sixth and Fourteenth Amendment claims of denial of fair trial and equal protection in connection with jury selection waived when not presented in trial court]; *People v. Saunders* (1993) 5 Cal.4th 580, 590 [defendant's failure to object that he was deprived of his right to jury trial on prior convictions resulted in forfeiture of that right]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174 [Sixth Amendment discriminatory juror selection issue waived when not presented in trial court]; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10 [Fifth, Eighth, and Fourteenth Amendment self-incrimination, cruel and unusual punishment, and due process claims respectively waived by failure to interpose them in trial court].) Defendant's constitutional contentions concerning the propriety of Judge Altman's testimony have been waived, forfeited, and procedurally defaulted.

2. Relevancy

Defendant filed a motion *in liming* prior to the commencement of testimony to exclude Judge Altman's testimony as irrelevant. Relevancy arguments are evaluated by appellate courts utilizing the deferential abuse of discretion standard-of review. *(People v. Kipp* (1998) 18 Cal.4th 349, 369: *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) The record does not reflect the trial court's specific ruling on the motion. However, there was inferential evidence of such a ruling. Prior to trial, Judge Lance [to commented that there had been a discussion between the court and counsel off the record where some rulings were made pursuant to Evidence Code section 402 and tentative rulings regarding depositions and "other matters." There were also discussions on the record regarding limiting Judge Altman's testimony to the three statements made by defendant in the Lopez trial. Judge Ito stated: "... [T]hen he can give an opinion as to why that testimony, if false, was material." Defense counsel acknowledged the relevancy of the judge's testimony: "Judge Altman is seated here. The Issue of his testimony is relevant to his [defendant's] credibility, to his expertise and to the nature and extent of the injuries of the people he treated or he testified that he treated. That's it." Finally, in her opposition to defendant's motion for new trial, the prosecutor acknowledged that the trial court had ruled on the motion *in limine*, finding that Judge Altman's testimony was relevant. The trial court, within the allowable scope of judicial discretion, could find the testimony of Judge Altman was relevant to the question of the materiality of defendant's false statements. (Evid. Code, § 210; 2 Witkin, Cal. Criminal Law (2d ed. 1988) § 1186, pp. 1366-1368; see *People v. Kobrin* (1995) 11 Cal.4th 416, 426.)

3. Opinion testimony

Defendant further argues that Judge Altman should not have been able to offer an opinion concerning the materiality of the false statements in the Lopez trial. As the Supreme Court has repeatedly held, the issue of admissibility of evidence is not cognizable on appeal if not raised before the trial judge. *(People v. Carpenter* (1997) 15 Cal.4th 312, *385; People v. Scott* (1997) 15 Cal.4th 1188, 1217-1218; *People v. Champion* (1995) 9 Cal.4th 879, 918; *People v. Clark* (1993) 5 Cal.4th 950,988. fn. 13; *People v. Raley* (1992) 2 Cal.4th 870, 892.) Defendant's motion *in limine* challenged only the relevancy of Judge Altman's testimony. It did not raise the issue of the propriety of his appearance as a witness who presented opinion testimony based upon special skill, knowledge, training. and experience. Nothing in the record reflects a further objection by defendant on this basis. As a result, he has forfeited or waived the right to raise the issue here concerning the propriety of the admissibility of Judge Altman's opinion.

In any event, Judge Altman's testimony as a witness offering opinion testimony could properly be admitted into evidence. We examine contentions a particular issue should not be the subject of opinion testimony utilizing the deferential abuse of discretion standard of review. *(People v. Mayfield (I* 997) 14 Cal.4th 668, 766; *People v. Chavez* (1985) 39 Cal.3d 823, 828.) The California Supreme Court has held that a properly qualified witness may "offer an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" *(People v. Mayfield, supra,* 14 Cal.4th at p. 766, quoting *People v. Cole* (1956) 47 Cal.2d 99, 103; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1095; see also Evid. Code, § 801, subd. (b).) In addition, the Supreme Court has held: "[A] particular expert is

sufficiently qualified if 'the witness has sufficient skill or experience in the field so that his [or her] testimony would be likely to assist the jury in the search for the truth.'" *(People v. Mayfield, supra,* 14 Cal.4th at p. 766, quoting *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.) The Supreme Court has also determined that an opinion testimony remains admissible even if it deals with the ultimate issue in the case. *(Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702; *People v.* Polk (1964) 61 Cal.2d 217, 233; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Doss* (1992) 4 Cal.App.4th 1585, 1596; Evid. Code, § 805.) The California Supreme Court has determined that the issue of materiality in a perjury case is a mixed question of fact and law to be resolved by the jury. *(People v. Kobrin, supra,* 11 Cal.4th at p. 425; see *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1572-1573.) In this case, the issue of materiality was the proper subject of opinion testimony to add to the jury's understanding of the issues. Judge Altman had the expertise and skills required to testify as to what was material in a civil action for damages, particularly in a matter over which he presided. Furthermore, materiality was an issue for which the jury may have had little or no knowledge. No abuse of discretion occurred in permitting Judge Altman to offer an opinion on the materiality issue.

4. Directed Verdict

Defendant's additional argument that Judge Altman's testimony on the materiality issue amounted to a directed verdict was waived by his failure to raise the specific claim in the trial court. *(People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015; *People v. Garceau, supra, 6* Cal.4th at p. 203; *People v. Sims* (1993) 5 Cal.4th 405, 448.) Nonetheless, we agree with the Attorney General that Judge Altman's testimony did not decide the issue of materiality for the jury. Furthermore, the jury was

issue of materiality for the jury. Furthermore, the jury was instructed: "In order to prove this crime [perjury], each of the following elements must be proved: [¶] ... The false statement was material...." The jury was also instructed regarding: the credibility of witnesses; witnesses' willfully false testimony; weighing conflicting testimony; sufficiency of testimony of one witness; opinion testimony; the ability to disregard any such unreasonable opinion testimony; perjury defined; the definition of under "penalty of perjury"; and the proof necessary for perjury, not based solely on the testimony of one witness. The testimony of Judge Altman did not result in a directed verdict. *(People v. Figueroa* (1986) 41 Cal.3d 714, 723-734; *People v. Jarrell (1987)* 196 Cal.App.3d 604, 609-611.)

5. Prejudice of Judge Altman's testimony

Defendant argues that Judge Altman's testimony was excessively prejudicial. This is especially so because Judge Altman presided over the civil matter in which defendant was alleged to have committed perjury. We examine this contention utilizing the deferential abuse of discretion standard of review. *(People v. Jones* (1998) 17 Cal.4th 279, 299-304; *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1128-1129.) In any event, Evidence Code section 700 provides that every person is qualified to be a-witness, except those prohibited by statute. Evidence Code section 703.5 provides in part: "NO person presiding at any judicial ... proceeding, ... shall be competent to testify, in any subsequent *civil* proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could ... constitute a crime...." [Emphasis added.] (See also *Hamilton v. Vasquez (1994) 17* F.3d *1149, 1155* [trial judge in criminal case may testify at federal evidentiary hearing in a related subsequent habeas

false testimony. Judge Altman was competent to testify thereto at the resulting criminal trial. No abuse of discretion occurred.

6. Judge Altman's testimony

Defendant argues that Judge Altman injected gratuitous prejudicial comments. Defendant argues these comments deprived him of a fair trial. More specifically, defendant argues: Judge Altman directly commented on his opinion that defendant lied in the Lopez case; Judge Altman added non-responsive commentary regarding defendant's credibility; and Judge Altman repeatedly exceeded the allowable scope of his testimony and volunteered prejudicial commentary. However, in only I instance cited amongst some 18 examples did defense counsel object to Judge Altman's testimony. In fact, much of the objectionable testimony was given by Judge Altman in response to cross-examination by defense counsel. As the trial court pointed out at the time defendant moved for mistrial: "[I]t was my impression that you were asking him some of these questions to let him run so to speak to establish his personal embroilment for impeachment purposes and given the responses that you got from him, many of which appeared to me to be nonresponsive. But I didn't hear a motion to strike or for any admonition. [¶] I think -- it was my impression that what you were doing at that time was so that in argument you can later say, if you recollect. I asked Judge Altman this question, which the answer to which was yes or no. and yet he had to volunteer that this was.... [¶] I thought you were asking those questions and eliciting those type of responses as a tactical decision to show any interest of bias that that witness might have had." The mistrial motion was an untimely effort to strike testimony defense counsel himself has elicited. We agree with the Attorney General that the issue of the purported impropriety of Judge Altman's answers has not been preserved because: no statutorily

answers has not been preserved because: no statutorily mandated motion to strike was ever interposed (Evid. Code, § 353, subd. (a)); the answers were in response to cross-examination propounded by defense counsel *(Ashley v. Rivera* (1934) 220 Cal. 75, 79 ["Appellant is now in no position to complain that prejudice has resulted from his own act in introducing said statement into the record"]; *Hofineister v. Delta Verde Farms* (1959) 171 CaLApp.2d 688, 697 ["appellants themselves introduced evidence of the circumstances surrounding the execution of the instruments and they cannot now complain of the admission of evidence which they themselves introduced"]; *Zarafonitis v. Yellow Cab Company* (1932) 127 Cal.App. 607, 609 ["Where evidence of facts likely to be prejudicial to a party are invited.... he is under well-settled principles in no position to complain ....]; 3 Witkin, Cal. Evidence (3rd ed. 1986) § 2014, p. 1974); the objection to the testimony was untimely (Evid. Code, § 353, subd. (a); *People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1014 [a party must make a timely and specific objection when the evidence is offered ...."]; *People v. Pride* (1992) 3 Cal.4th 195, 240 ["a prompt objection and admonition would have cured any harmful effect ...."]; *People v. Corrigan* (1957) 48 Cal.2d 551, 555-556 ["No objection was made to the questions asked of the witness by the judge, nor did defendant make a motion to strike the questions or answers. It is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred. [Citations.]"]; *People v. Camacho* (1993) 19 Cal.App.4th 1737, 1745 ["Appellants, by waiting until after the trial court had *concluded* its questioning and after the prosecutor had concluded his recross-examination- failed to timely object to trial court 'cross-examination.' (Evid. Code. § 353 [orig. italics])"); *Pineda v. Los Angeles Turf Club. Inc.* (1980) 112 Cal.App.3d 53, 61 [objection near end of physician's testimony untimely]; *Wagner v. Osborn* (1964) 225 Cal.App.2d 36, 44 ["Objections on the

evidence of the blood sample was already in the record ... came too late...."]; see *Romero v. Volunteer State Life Ins. Co.* (1970) 10 Cal.App.3d 571, 577 [" 'Objections on the foundation of the expert's opinion interposed after evidence of the blood sample was already in the record not only came too late, but failed to specify the particular defect now urged. The objections insofar as admissibility of the evidence is concerned must be held to have been waived.'"]; 3 Witkin, Cal. Evidence, *supra, §* 2013, p. 1973); Wegner, Cal. Practice Guide Civil Trials and Evidence (1997) § 8:3311, p. 8G-6); and no request for an admonition was ever made which would have obviated any harm. *(People v. Cox (1991)* 53 Cal.3d 618, 682, citing *People v. Green* (1980) 27 Cal.3d 1, 27.) Here, defense counsel utilized Judge Altman's testimony in closing argument to impeach and diminish its importance.[3] Defendant has therefore waived the issue on

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[3] Defense counsel argued in part: "You've got a bigoted court judge mad as a hatter who came in here and testified this school was a flea bag in the Caribbean. This is a perfect case for a jury because when you have someone in the system, the D.A.'s office or a judge after you, you need people from the community to decide the case, because otherwise, you are not going to get a fair shot. . . . And all of a sudden, the focus comes out on Dr. Chein with an incredible fallacy that I almost wouldn't know that it was coming from -- sort of sinister for this case until I saw Judge Altman unfortunately on cross-examination. Then you know what this case is all about. It's about a judge who has an ego. And when I read the transcript of what he said, the way lie insisted what he heard and he insisted then and he insisted now that Dr. Chein said something that he didn't say -- but more importantly, what the prosecutor told you in her opening statement was that Judge Altman took the case away from the jury because of Dr. Chein's

appeal.

C. No Prosecutorial Misconduct Occurred

Defendant argues that alleged instances of prosecutorial misconduct permeated the -trial to his prejudice and resulted in the denial of a fair trial as guaranteed by the state and federal Constitutions. Preliminarily, this contention of constitutional error was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, *and* procedural default. *(People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Vera, supra,*15 Cal.4th at p. *274; People v.*

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the case away from the jury because of Dr. Chein's testimony. [¶] What kind of judge is that? Mr. and Mrs. Lopez had a right to a trial, didn't they? And because a witness is called that the judge doesn't like his testimony, he considers the school a flea bag in the Caribbean, because he makes a mistake, he takes the case away.... And he came in here and tried to do the same thing. [¶] And I stack my client's testimony against Judge Altman's. And unfortunately, I think Judge Altman slighted his duty as a judge when he testified in this case and he did the very kind of things, did he not, that he accuses Dr. Chein of doing." Defense counsel continued: "Now. Altman was a partisan. He's obviously sort of the probably [sic] instigator of this case. So -- it's not like he's being paid money, but he's got something more at stake, which is his ego. which apparently is enormous . . . . [¶] So he does the very thing that he doesn't like about Dr. Chein, that Dr. Chein, as a partisan witness, if given a choice between two answers-- like any other partisan witness . . . basically is paid to be an advocate..."Defense counsel gave examples of the judge's testimony and continued: "So he violated his duty as a judge. He slighted the U.S. Constitution. He violated the common understanding of how this case was going to run, all because he wanted to stick it to Dr. Chein who you'll see from the transcript he does not like."

supra, 8 Cal.4th at p. 1116, fn. *20; People v. Garceau, supra,* 6 Cal.4th at p. 173; *People v. Saunders, supra,* 5 Cal.4th at p. 590; *People v. McPeters, supra,* 2 Cal.4th at p. 1174; *People v. Walker* (1991) 54 Cal.3d 1013, 1023; *People v. Ashmus, supra,* 54 Cal.3d at - pp. 972-973, fn. 10; *People v. Yarbrough* (1997) 57 Cal.App.4th 469, 477-478.)

In reviewing the principles governing findings of prosecutorial misconduct the California Supreme Court has *consistently* noted: "The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's... intemperate behavior violates the federal *Constitution* when it comprises a pattern of conduct "so egregious that it infects the trial with such *unfairness* as to make the conviction a denial of due process. [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.]" *(People v. Hill, supra,* 17 Cal.4th at p. 819, quoting *People v. Gionis* (1995) 9 Cal.4th 1196, 1215, *People v. Espinoza* (1992) 3 Cal.4th 806, 820, and *People v. Samayoa* (1997) 15 Cal.4th 795, 841, internal quotations omitted; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084.)

A reviewing court will generally not review a claim of prosecutorial misconduct unless an objection and request for admonishment was raised at trial, or unless an admonishment would not have cured the harm. *(People v. Gionis, supra,* 9 Cal.4th at p. 1215; *People v. Price* (1991) 1 Cal.4th 324, 447.) The California Supreme Court has held: "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the minds of the jury."'" *(People v.*

harmful effect upon the minds of the jury."'" *(People v. Cox, supra,* 53 Cal.3d at p. 682, quoting *People v. Green, supra,* 27 Cal.3d at p. 27.)

Defendant argues three separate instances of prosecutorial misconduct occurred. First, during the prosecutor's opening argument, defense counsel objected to the prosecutor's references to the issues involved in the Lopez case.[4] The trial court sustained three objections and later admonished the jury to disregard the references to "fraud" or "set-up automobile accident" referred to in the opening argument. Furthermore, the jury was instructed that the statements of counsel were not evidence. The United States Supreme Court has determined that juries have the ability to "approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge..." *(Spencer v. Texas* (1967) 385 U.S. 554, 565.) The California Supreme Court has consistently stated that on appeal it is presumed that the jury is capable of following the instructions they are given. *(People v. Bonin* (1988) 46 Cal.3d 659, 699, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1; *People v. Kemp* (1961) 55 Cal.2d 458, *477*; *People v.*

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[4] There appeared to be some confusion regarding the trial court's limitation on the prosecutor's opening argument. Following its conclusion and prior to the trial court's admonition to the jury, the prosecutor stated: "You [the court] expressed to me I needed to phrase everything as being an issue and not retrying the Lopez case and saying that one thing happened, and I never declared that anything happened, but only that these were issues; and I understood your admonition was, don't retry the Lopez case." The trial court then clarified: "[T]he issue is Dr. Chein's qualifications to testify in the matter and the weight that a trier of fact would give to his testimony, and the fact that it involved the testimony given in a case that more than one person suspects it was a setup accident is not directly relevant in this case."

48 Cal.2d 20, 23.) There is no indication that the prosecutor used deceptive or reprehensible methods to attempt to persuade the jury or that the jury failed to follow the court's admonition and instructions here.

Second, it is argued that the prosecutor ignored the trial court's order to limit Judge Altman's testimony to the opinion testimony about why defendant's statement in the Lopez matter, if false, was material. Defendant refers to Judge Altman's "multi-pronged character attack on appellant including references to the `bogus' accident in which appellant treated the victim-plaintiffs ...." Defendant argues his fair trial rights were irreparably damaged at the outset of the proceedings in the present case. However, as noted earlier, most of the testimony to which defendant now objects to for the first time on appeal was elicited during the cross-examination of Judge Altman by defense counsel. Furthermore, in those instances where the testimony to which defendant now objects was elicited on direct examination, defense counsel objected only once. More specifically, when asked by the prosecutor whether the American Board of Orthopedic and Neurological Surgery was approved of by the American Medical Association, Judge Altman responded that it was a "phony board." Defense counsel objected on the grounds the question called for a conclusion. The trial court ruled that Judge Altman could testify regarding whether or not he knew if the board was recognized by the American Medical Association. The prosecutor's question was innocuous. Furthermore, there were no requests for admonitions regarding that question or any other inquiry posed by the prosecutor. Therefore, defendant has waived the issue on appeal. *(People v. Gionis, supra,* 9 Cal.4th at p. 1215; *People v. Price, supra,* 1 Cal.4th at p. 447.)

Even if we reach the merits of the misconduct claims, we find no impropriety. The Supreme Court has

claims, we find no impropriety. The Supreme Court has held: "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can Include reasonable inferences, or deductions to be drawn therefrom. [Citations.]... A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness [citation], and he may use appropriate epithets.... *(People v. Wharton* [(1991)] 53 Cal.3d [522.] 567-568 [ ].)" *(People v. Hill. supra,* 17 Cal.4th at p. 819, internal quotes omitted. quoting *People v. Williams, supra,* 16 Cal.4th at p. 221.) Here the prosecutor properly responded in rebuttal to defense counsel's passionate argument in his effort to discredit Judge Altman's testimony. (See fn. 3 *ante.)* Finally, we find the alleged prosecutorial misconduct, even if true, was harmless in this instance and a different result is not reasonably probable absent such conduct. *(People v. Hardy* (1992) 2 Cal.4th 86, 172-173; *People v. Milner* (1988) 45 Cal.3d 227, 245.) As will be discussed below, there was strong evidence of defendant's guilt as to three of the counts. The jury was instructed that the statements of the attorneys was not evidence. The jury found defendant not guilty of one of the perjury counts. Finally, the prosecutor repeatedly explained she was not commenting on the merits of the Lopez case. While the prosecutor may have exceeded the limitations imposed by the trial court regarding references to the Lopez trial and emphasized Judge Altman's disdain for defendant's false testimony, her comments did not render the instant proceedings fundamentally unfair and did not amount to a deceptive or reprehensible method of persuasion. *(Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643; *People v. Gionis, supra,* 9 Cal.4th at pp. 1218-1219; *People v. Espinoza, supra, 3* Cal.4th at p. 820.)

D. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his convictions for perjury. We review the evidence in alight most favorable to the judgment. *(Jackson v. Virginia, supra,* 443 U.S. at p. 319; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Barnes, supra,* 42 Cal.3d at p. 303.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *(Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Marshall, supra,* 15 Cal.4th at p. 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. *(People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

Perjury involves a willful statement, under oath, of any material matter which the witness knows to be false. (§ 118; *Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 735: *People v. Howard* (1993) 17 Cal.App.4th 999. 1004.) The Courts of Appeal have held: "It is the statement's tendency to influence the trial which is of importance. regardless of whether it did in fact have an influential result." *(People v. Gamble* (1970) 8 Cal.App.3d 142, 146; *People v. Darcy* (1943) 59 Cal.App.2d 342, 349, overruled on another point in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11; § 123.) Section 123 provides: "It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding." The Court of Appeal has held, "False testimony even unrelated to an issue but which has the tendency to impeach the credibility of

a witness who testified on a material issue may be perjurious." *(People v. Gamble, supra,* 8 Cal.App.3d at p. 146; see also *People v. Barry* (1883) 63 Cal. 62, 64.) Perjury may be committed even though it does not affect the outcome of the proceedings. *(People v. Gillard* (1997) 57 Cal.App.4th 136, 158; *People v. Gamble, supra,* 8 Cal.App.4th at p. 146.)

The relevant evidence was as follows. Defendant appeared as a witness offering opinion testimony based upon special skill, knowledge, training, and experience as the treating physician in the Lopez matter regarding the injuries suffered by two of his patients in an automobile accident. Defendant testified in that case that his medical specialty following his residency was in orthopedic surgery and physical medicine. In fact, defendant's residency was in physical medicine and rehabilitation. Four board certified specialists in orthopedic surgery testified defendant was not appropriately trained in that specialty. Further, they testified defendant could not honestly state his specialty was in orthopedic surgery. A board certified specialist in physical medicine and rehabilitation gave similar testimony. Count 1 charged defendant with perjury for his false representation that he was a specialist in orthopedic surgery. The jury could reasonably conclude defendant's testimony was material to the outcome of the Lopez case because it related to his ability to convince the jury that his testimony was credible regarding the plaintiffs' alleged injuries. Defendant further testified in the Lopez case that he had one office location on October 9, 1989, and at the time of his testimony. Testimony and numerous exhibits revealed that defendant had six or more office locations from which he practiced medicine. Count 2 charged defendant with perjury as a result of his false testimony under oath regarding the number of office locations he had. The jury could reasonably conclude this false testimony was material to the outcome of the Lopez trial because it affected the jury's perception of defendant's qualifications. An adverse inference may be

drawn from a physician's use of many offices. If a physician works out of several offices, it may appear that he handles numerous personal injury or worker's compensation cases only for purposes of lawsuits. On the other hand, if he has only one office, the inference may be drawn that the physician operates an ordinary medical practice. The foregoing falsehoods had a tendency to enhance the credibility of defendant. Further, Judge Altman's testimony constituted substantial evidence as to both of these matters.

Defendant's conviction in count 4 related to his answer to a written interrogatory in a lawsuit brought by Dr. Dirk Kancilia against defendant for fraud, breach of contract, and a request for an accounting. The interrogatory requested the name, address, and highest grade of each school defendant attended as well as dates of attendance and degree attained. Defendant responded that he graduated from the "American University School of Medicine, Florida 1979-1980 MD[.]" In fact, defendant graduated from the American University of the Caribbean School of Medicine. The jurors could conclude defendant's interrogatory answer was material to the outcome of that case because it went to his credibility both as a party to the lawsuit and as a physician in business with Dr. Kancilia. Substantial evidence supports the judgment. The false interrogatory answers, which could enhance defendant's credibility and stature, might have been used to affect the proceeding. (§ 123; see *People v. Kobrin, supra,* 11 Cal.4th at p. 420.)

E. Defendant's Requested Instruction Regarding Ambiguous Questions

Defendant argues the trial court should have given the special instruction on ambiguous questions and answers as proposed by defense counsel. The instruction read: "It is

the prosecution's burden to establish beyond a reasonable doubt that the declarations or answers by the defendant were in fact false. [¶] If you should find that a particular question is ambiguous -- that is, subject to more than one interpretation -- and that the defendant truthfully answered one interpretation of the question, then such answer would not be false. Similarly, if you should find that the question was clear but the answer ambiguous, and one interpretation of the answer would be truthful, then such answer would not be false. [¶] In deciding whether the defendant's answers are false, the answers must be given their meaning in the context in which the words were used. If you find that an answer given by the defendant was literally true, but unresponsive to the question asked, you may not find that answer false. As long as his statement, or an interpretation of his statement, is narrowly or literally true, there can be no conviction for perjury. This is so even if you find that the answer was intentionally misleading."

A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence (§§ 1093, subd. (f), 1127; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Grant* (1988) 45 Cal.3d 829, 847; *People v. Melton* (1988) 44 Cal.3d 713, 746; *People v. Flannel* (1979) 25 Cal.3d 668, 680-681.) When the evidence is minimal and insubstantial, there is no duty to instruct. *(People v. Barton* (1995) 12 Cal.4th 186. 196, fn. 5; *People v. Banyan/* (1988) 45 Cal.3d 1189. 1232; *People v. Flannel, supra.* 25 Cal.3d at p. 684; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) Defendant argues that the proposed instruction was necessary to inform the jurors that "an ambiguous question and/or answer cannot be the basis of a perjury prosecution because there is no showing of the element of falsity." He further argues the questions and answers related to the terms "specialist;" offices "had" versus "practiced out of," and the name and address of his medical school as interpreted were

central to the case. However, we find nothing ambiguous in either the questions or answers related to the perjurious conduct here. When asked what-his medical specialty was, defendant, a physician who had previously testified as a witness, answered "board certified in December 1988 by the American Board of Orthopedic and Neurological Surgery." Defendant further testified that his medical specialty was "physical medicine and orthopedic surgery." None of this was true. When asked how many office locations he had at the time he testified in the Lopez case and on October 9, 1989, defendant answered, "One." As noted previously herein, the evidence presented at trial demonstrated that defendant had more than one office location. The evidence indicated defendant also practiced out of more than one office location. Finally, the question in the interrogatory could not have been more clear in requesting the name and address of each academic institution defendant attended along with the dates of attendance, highest grade level, and degree received. Defendant's answer, on the other hand, was false.

This case is distinguishable from the recent case of *Cabe v. Superior Court, supra.* 63 Cal.App.4th at page 740. In *Cabe,* when asked on voir dire whether "'[a]nybody in your immediate family *or* yourself have been arrested?'" a prospective juror responded that one of his sons had been arrested. He neglected to add that he had also been arrested. *(Ibid.* orig. italics.) Relying on *Bronston v. United States* (1973) 409 U.S. 352, 355, and *In re Rosoto* (1974) 10 Cal.3d 939, 949, our colleagues in Division Two of this court determined that because the witness's answer was partially unresponsive but literally true it could not be the source of a perjury charge. *(Cabe v. Superior Court, supra, 63* Cal.App.4th at pp. 740-743.) Here, other jury instructions, based in part on the *Bronston* and *Rosoto* cases, adequately informed the jury that they must consider: as honest mistake and belief in the truth of the answers

given; the context in which the questions were asked and answers were given; the fact that an answer which was literally true though misleading or unresponsive may not form the basis of a perjury conviction; and the witness need not volunteer more explicit information unless asked or required to do so.[5] The jury's finding of not guilty on count 3 is demonstrative of the fact that the jury understood these instructions.[6] As a result, defendant suffered no prejudice as a result of the trial court's refusal to give the proposed instruction. Finally, we find it is not reasonably probable that a result more favorable to defendant would

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[5] The jury was instructed with CALJIC No. 7.24 as follows: "Perjury requires that the statement be made willfully by a person who knows that the statement is being made under oath or penalty of perjury and who knows or believes that the statement is false. [¶] A statement made under an honest mistake and in a belief that it is true is not perjury even though the statement is false. [¶] The word `willfully' simply means a purpose or willingness to commit the act or make the omission referred to."

The jury was also instructed with an instruction on literal truth as follows: "In evaluating the questions and answers upon which charges of perjury are based, you may consider the entire context in which the questions are asked and the answers given, including other questions and answers given during the testimony. [¶] However a perjury conviction may not be based upon an answer which is literally true although misleading or unresponsive. A witness is not required to volunteer more explicit information unless asked or required to do so."

[6] Count 3 charged defendant with perjury regarding his testimony in the Lopez case that he graduated from Cornell Medical School. The transcript read: "'Q. And would you indicate where you went to medical school, sir? [¶] A. I went to medical school at Cornell University Medical College, New York. [¶] Q. Did you graduate, sir? [¶] A. I graduated in 1980. [¶] Q. And you got a degree and graduated? [¶] A. Yes.'" The jury apparently found defendant's answer literally true in the context of the question as asked.

have been reached absent any error in failing to so instruct. *(People v. Scheid, supra,* 16 Cal.4th at p. 21; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

F. Instruction To View Defendant's Admissions With Caution

Defendant argues the trial court should not have instructed the jury to view his admissions with caution pursuant to CALJIC No. 2.71[7] because the his statements were -read to the jury as recorded in a trial transcript and as answer to an interrogatory. The Attorney General concedes, and we agree, that whenever a defendant's statements are recorded the cautionary part of the instruction need not be given. *(People v. Hines* (1964) 61 Cal.2d 164, 173, overruled on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-775, fn. 40; *People v. Gardner* (1961) 195 Cal.App.2d 829, 832.) However, we disagree with defendant that the instruction was either tantamount to telling the jury to view his exculpatory testimony with caution or that it resulted in prejudice. The instruction was never utilized in argument to apply to any exculpatory evidence. Defendant did not testify. The error was harmless. *(Chapman v. California* (1967) 386 U.S. 18,

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[7] CALJIC No. 2.71 was given as follows: "An admission is a statement made by the defendant other than at his trial which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that pan which you find to be true. [¶] [Evidence of an oral admission of the defendant should be viewed with caution.]"

22; *People v. Watson, supra,* 46 Cal.2d at pp. 836-837.) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the truth-finding process or accrue to defendant's detriment. *(People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo* (1993) 6 Cal.4th 585, 637.)

G. Delivery Element of Count Four

Defendant argues the court's failure to instruct the jury on the element of delivery of the perjury charge related to the declaration in count 4 is federal constitutional error, which should be reversed.[8] We disagree that reversal is in order. Count 4 was based upon defendant's answer to an interrogatory in the Kancilia case, requesting the name and address of academic institutions, including dates attended and degree attained. Defendant was a party in the Kancilia case. Defendant argues he did not concede delivery and it was not a mere "peripheral issue." He argues the trial evidence on the delivery issue was "weak based on the 'custom and practice' of the civil attorney's office which sent the declaration to Dr. Kancilia's attorney." Defendant relies upon *People v. Griffith* (1998) 65 Cal.App.4th 581, 587, which held the mere making of a declaration is insufficient to constitute perjury. The declaration must be delivered to someone with the intent that it be published as true. *(Id.* at p. 587.)

However, we disagree with defendant's conclusion that the failure to instruct on the element of delivery of the declaration is reversible *per se* in this case. The

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[8] Section 124 provides in pertinent part: "The making of a deposition,... is deemed to be complete... from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true."

instructional error here was a trial rather than a structural error. *(California v. Roy* (1996) 519 U.S. 2, [117 S.Ct. 337, 338-339]; *Pope v. Illinois* (1987) 481 U.S. 497, 503-504, fn. 7; *People v. Flood* (1998) 18 Cal.4th 470, 503.) Hence we apply the *Chapman v. California, supra,* 386 U.S. at pages 22-23 standard of reversible error. The United States Supreme Court has repeatedly noted that in conducting *Chapman* harmless error analysis, we must evaluate the "'entire record....'"*(Rose v. Clark* (1986) 478 U.S. 570, 583; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) The initial step in *Chapman* analysis for a reviewing court is as follows, "'First, it must ask what evidence the jury actually considered in reaching its verdict.' *(Yates v. Evatt* [(1991)] 500 U.S. [391,] 404 [].)... [A] reviewing court 'must then weigh the probative force of that evidence as against the probative force of the [erroneous instruction] standing alone.' *(Ibid.)* In analyzing the prejudicial effect of a constitutional instructional error, we may consider the fact that the evidence and proof of guilt concerning the omitted element is overwhelming, uncontradicted, or dispositive. *(Rose v. Clark, supra,* 478 U.S. at p. 583 []; *Burger v. Kemp* [(1987)] 483 U.S. [776,] 782-783, fn. 5 [].) Further, in conducting federal constitutional review, the United States Supreme Court has held, 'An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.' *(Henderson v. Kibbe* (1977) 431 U.S. 145, 155 [].) Finally, in *Pope v. Illinois, supra,* 481 U.S. at page 503, footnote 6 [], the United States Supreme Court indicated its prior holding in *Rose [v. Clark, supra,* 478 U.S. at page 503] required on appeal a review of the record be made to determine whether 'the facts - found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.'" *(People v. Avila* (1995) 35 Cal.App.4th 642, 662-663, fn. omitted; see *Dickey v. Lewis* (9th Cir. 1988)

859 F.2d 1365, 1370; *McKenzie v. Risley* (9th Cir. 1988) 842 F.2d 1525, 1530.)

There was no material dispute in the evidence concerning whether the false interrogatory answers were delivered. Mark Weubben, the attorney for Dr. Kancilia, testified for the prosecution. Mr. Weubben testified as to the service of the Judicial Council form interrogatories, which were an exhibit during the trial. Mr. Weubben also identified the answers to the interrogatories which contained false information which were likewise received as an exhibit during the trial of the present case. Attached to the - interrogatory answers is a verification under penalty of perjury signed by defendant. The following testimony was offered by Mr. Weubben: "Q At-some point in time, did you receive in the mail the responses to those interrogatories? [¶] A Eventually, yes, I did." Mr. Weubben physically brought the interrogatory answers-which had been served upon him to court with him. There was no evidence introduced that the interrogatory answers containing inaccurate information were not served. Moreover, defense counsel's lengthy argument to the jurors did not dispute that the interrogatory answers were in fact served as testified to by Mr. Weubben. Under these circumstances, the purported error was harmless beyond a reasonable doubt. *(U S. v. Rogers* (11th Cir. 1996) 94 F.3d 1519, 1526-1527; *People v. Flood, supra, 18* Cal.4th at pp. 504-505.)

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J

We Concur:

Armstrong, J.

Godoy Perez, J.

Second Appellate District, Division Five, No. B113514
S075587

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

EDMUND Y. CHEIN, APPELLANT

SUPREME COURT
FILED
MAR 9 1999

Robert Wandruff Clerk

DEPUTY
[Stamp]

Appellant's petition for review DENIED

GEORGE

Chief Justice

Filed
Clerk, U.S. District Court

MAY 23 2001

CENTERAL DISTRICT OF CALIFORNIA
BY MC DEPUTY
[Stamp]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

EDMUND Y. CHIEN	)	Case No. CV 99-05296 (AN)
	)	
Petitioner,	)	
	)	REPORT AND
v.	)	RECOMMENDATION OF
	)	UNITED STATES
RICHARD SHUMSKY,	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to 28 U.S.C. 4 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be denied and that this action be dismissed with prejudice.

I. BACKGROUND

A. Underlying Conviction

On December 23, 1996, petitioner Edmund Y. Chein was convicted in Los Angeles Superior Court on three counts of perjury in violation of California Penal Code § 118. [Clerk's Transcript ["C.T."] at 772-80.] That conviction arose from testimony petitioner gave in two civil cases in 1590 and 1992. [Id.]

The first case was Lopez v. Consolidated Freightways, Los Angeles County Superior Court Case No. WEC 105580 ("the Lopez case"), presided over by the Honorable Robert Altman. [C.T. at 774-80.] In that case, Frank and Sandra Lopez had been injured when their automobile was rear-ended by a vehicle driven by Joel Frederick. [Reporter's Transcript ("R.T.") at 527.] Mr. and Yrs. Lopez sued Frederick and his employer, Consolidated Freightways, for their injuries. [Id.] Petitioner was the treating physician for the plaintiffs and testified on their behalf. [R.T. at 533.] During the course of his testimony on behalf of the Lopez plaintiffs, petitioner made two false statements. First, he testified that he was a specialist in orthopedic surgery. [R.T. at 538-40, 46-47.1 Second, petitioner testified that he practiced out of only one office. [R.T. at 551-555.]

The second case in which petitioner allegedly committed perjury was Kancilia v. Chein , Los Angeles County Superior Court Case No. LC012300 ("the Kancilia case"). [C.T. at 772, 779-80.] In that case, petitioner was being sued by his former partner, Dirk Kancilia, after the dissolution of their partnership, for an accounting of funds. [R.T. at 1024-26.] During the course of that litigation, petitioner was served with a set of interrogatories which asked him to identify, *inter alia*, the

name and address of each school he had attended.[R.T. at 1030.] As part of his response, petitioner gave the following false answer: "American University School of Medicine, Florida, 1979-1980, M.D." [R.T. at 1031.]

Petitioner was convicted by jury of committing these three acts of perjury. [C.T. at 772-801] He was sentenced to 3 years of supervised probation, 30 days in custody to be served on weekends, 1,000 hours of community service, and a $1,000 fine. [C.T. at 960.] The California Court of Appeal affirmed the conviction on November 20, 1998. [Respondent's Record E.] On March 9, 1999, the California Supreme Court denied a petition for direct review. [Id.]

B. Present Petition

On May 19, 1599, petitioner filed, through counsel, a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. He seeks to challenge his conviction on five grounds.

The first claim stems from the fact that the prosecution's primary witness regarding the testimony petitioner gave in the Lopez case was Judge Altman, the jurist who presided. Petitioner argues that such testimony by a sitting judicial officer was inappropriate and violative of due process. [Petition at 6-10.] In Ground Two, petitioner claims that the prosecutor committed misconduct through statements she made during opening and closing arguments and by the testimony she elicited from Judge Altman. [Petition at 10-17.] In Ground Three, petitioner contends that the evidence of perjury was insufficient to sustain the conviction. [Petition at 17-21.] In Ground Four, petitioner asserts he was denied due process when the trial court refused to give a requested defense instruction informing the jury that ambiguous questions or answers cannot form the basis for a perjury conviction. [Petition at 21-22.] Finally, petitioner

claims that the court erred by instructing the jury that petitioner's testimony should be viewed with caution. [Petition at 22.]

The Petition is supported by a set of Points and Authorities ("Petition P&A") filed concurrently with the Petition. Respondent has filed his Return to Petition ("Return") and a supporting Points and Authorities in Opposition to Petition ("Return P&A"). Respondent argues that petitioner's various claims are unexhausted, procedurally defaulted, do not state federal claims, and fail on their merits even assuming they are federal claims. Petitioner has filed a Traverse to Respondent's Return ("Traverse"), supported by a set of Points and Authorities ("Traverse P&A"). The matter now stands submitted.

II. DISCUSSION

A. Standard of Review

The federal habeas statute prescribes the degree of deference that must be accorded in federal habeas proceedings to state court decisions which previously addressed pending habeas claims, providing as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law if the state court applies a rule that contradicts the governing law set forth by the Supreme Court or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a different result. Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court but unreasonably applies that principle to the facts of the case. Id. at 407-08.

However, to find an unreasonable application of Supreme Court precedent, a federal habeas court may not conclude merely that the petitioner has the better of two reasonable legal arguments. Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.), *cert. denied*, 121 S.Ct. 340 (2000). Rather, the reviewing court must find that "clear error" occurred. Id. That is, the court must be left with a firm conviction that one answer, the one rejected by the state court, was correct and the other, the application of federal law that the state court adopted, was erroneous. Id.

Under the terms of the statute, the key to triggering this standard of review is a previous "adjudicat[ion] on the merits in State court proceedings." Therefore, this Court must apply §2254(d)'s deferential standard of review to the extent petitioner's claims were addressed and disposed of on the merits by the state courts.

B. Ground One: Testimony of Judge Altman

Petitioner first claims that the admission of Judge Altman's testimony violated due process. [Petition at 6-10.] Respondent argues that this claim is unexhausted, procedurally defaulted, does not state a federal claim, and fails on its merits in any event. [Return at 3-13; Return P&A at 17-21.]

1. Exhaustion/Procedural Default

Exhaustion and procedural default are related but distinct doctrines within federal habeas corpus jurisprudence. Batchelor v. Cupp, 693 F.2d 859, 861 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212, 103 S.Ct. 3547, 77 L.Ed.2d 1395 (1983). Under the exhaustion doctrine, a state prisoner must first give the highest state court an opportunity to rule on the merits of his claims before he presents them to a federal court. Id. at 862. Procedural default, by contrast, asks not whether a prisoner has exhausted his claims but whether he has done so *properly,* fairly presenting his claims to the state courts and giving them a genuine opportunity to reach the merits of his contentions. O'Sullivan v. Boerckel, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); Batchelor, 693 F.2d at 862.

Both doctrines stem from the same basic principle of federalism that federal courts should accord due respect to the role of state courts in enforcing constitutional rights. Batchelor, 693 F.2d at 861-62. However, procedural default protects the integrity of the exhaustion rule. O'Sullivan, 526 U.S. at 848. Without the procedural default doctrine, a petitioner could evade the exhaustion requirement by, for example, letting the time run on his state remedies. Id. Thus, under the procedural default rule, when a petitioner has failed to comply with reasonable state procedures in presenting a federal claim to the state courts, and the state courts have

declined to reach the merits of the claim as a result of this failure, the federal courts, as a matter of comity, must decline to reach the merits of the claim as well. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982).

In this case, respondent argues that petitioner did not exhaust his claim regarding Judge Altman's testimony because he presented this claim to the California courts as a state law claim rather than a federal due process claim. [Return at 4; Return P&A at 18-19.] However, as petitioner contends [Traverse at 3-7; Traverse P&A at 11-14], the record belies this assertion. Petitioner presented his claim to both the California Court of Appeal and the California Supreme Court as a federal due process claim. [Respondent's Record D at 1; Respondent's Record F at 6-8.] Indeed, the Court of Appeal expressly recognized that petitioner was raising a federal claim. [Respondent's 161 Record E, Part 1, at 4-5.] A federal court must find that exhaustion has been satisfied where a petitioner has presented his claim to the highest state court. Jackson, 693 F.2d at 669. Petitioner has done so here.

However, respondent argues in the alternative that even if petitioner's claim is exhausted, it has been procedurally defaulted. [Return at 4; Return P&A at 19.] This argument is more persuasive. As discussed above, under the doctrine of procedural default, when a state court denies a challenge to a criminal conviction for failure to comply with a state procedural rule, a federal court is precluded from reviewing the claim in the context of a subsequent federal habeas proceeding. Ylst v. Nunnemaker, 501 U.S. 797, 801, 111 S.Ct. 2590, 28 115 L.Ed.2d 706 (1991). In order for procedural default to apply, the state court's denial of the claim must rest on a state law ground that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). For a state law ground to be

"independent," it must not be interwoven with federal law. La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001). For a state law ground to be "adequate," it must be strictly or regularly followed and consistently applied. Id.

In order to determine whether a procedural default has occurred, this Court must examine the basis of the relevant state court judgment. Coleman, 501 U.S. at 739. As noted, petitioner raised before the California Court of Appeal his due process challenge to the admission of Judge Altman's testimony. [Respondent's Record D at 1.] In its Opinion denying petitioner's appeal, the Court of Appeal ruled that petitioner could not raise any constitutional objections concerning Judge Altman's testimony because any "constitutional contentions concerning the propriety of Judge Altman's testimony have been waived, forfeited, and procedurally defaulted." [Respondent's Record E, Fart 1, at 4-5.] This finding is clear on its face, indicating a procedural default of petitioner's claim.

Petitioner subsequently raised his constitutional claim in his Petition for Review to the California Supreme Court. [Respondent's Record F at 6-8.] The state high court denied the Petition without discussion or citation. [Respondent's Record E, Part 2.] Where there has been one reasoned state court judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same ground. Ylst, 501 U.S. at 803. Therefore, the California Supreme Court, in effect, affirmed the ruling of the Court of Appeal, and petitioner's due process challenge to Judge Altman's testimony was found procedurally defaulted by the California appellate courts.

However, petitioner makes a number of arguments in opposition to a finding of procedural default. First, petitioner contends that the particular procedural bar asserted by the

state court was not independent and adequate. [Petition P&A at 17-19; Traverse at 7.] In its Opinion, the Court of Appeal ruled "that defendant may not raise any constitutional objections on appeal concerning Judge Altman's testimony. . . because defendant never raised them before the trial judge." [Respondent's Record E, Part 1, at 4.] The court noted that, in California, "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." [Id.] The court found that petitioner had not done so and, on that basis, ruled that his constitutional challenge to Judge Altman's testimony had been waived. [Id. at 4-5.]

The procedural rule invoked by the Court of Appeal clearly is "independent" in that it is not interwoven with federal law, and indeed petitioner does not contest its independence. Rather, petitioner argues that the rule is not "adequate" because it is not strictly or regularly followed and consistently applied by the California state courts. [Petition P&A at 17-19; Traverse at 7.] This argument simply is not supported by the case law.

The California courts regularly follow and consistently apply the rule that a constitutional objection to the admission of testimony mast be raised at trial. *See* People v. Barnett, 17 Cal.4th 1044, 1119 n.54, 74 Cal.Rptr.2d 121, *cert. denied,* 525 U.S. 1044, 119 S.Ct. 598, 142 L.Ed.2d 539 (1998); People v. Jackson, 13 Cal.4th 1164, 1214 n.6, 56 Cal.Rptr.2d 49 (1596), *cert. denied*, 520 U.S. 1216, 117 S.Ct. 1705, 137 L.Ed.2d 830 (1997); People v. Rodrigues, 8 Cal.4th 1060, 1116 n.20, 36 Cal.Rptr.2d 235 (1994), *cert. denied*, 516 U.S. 851, 116 S.Ct. 147, 133 L.Ed.2d 93 (1995); People v. Ashmus, 54 Cal.3d 932, 972 n.10, 2 Cal.Rptr.2d 112 (1991), *cert. denied*, 506 U.S. 841, 113 S.Ct. 124, 121 L.Ed.2d 79 (1992); People v. Benson, 52 Cal.3d 754, 788, 276 Cal.Rptr. 827 (1990), *cert. denied*, 502 U.S. 924, 112 S.Ct. 336, 116 L.Ed.2d 277 (1991). Furthermore, the Ninth Circuit has recognized that California's "contemporaneous

objection" rule for challenging the admission of testimony is an independent and adequate ground which will support a procedural default. Bonin v. Calderon, 59 F.3d 815,842-43 (9th Cir. 1995), *cert. denied*, 516 U.S. 1051, 116 S.Ct. 718, 133 L.Ed.2d 671 (1996).

Petitioner next argues that even if the rule invoked was independent and adequate, it was misapplied in this case because defense counsel did in fact make constitutional objections to Judge Altman's testimony. [Petition P&A at 15-17; Traverse P&A at 14-17.] This argument fails for two reasons.

First, as the federal courts have uniformly held, we are bound to respect a state court's finding of procedural default under its own laws. See Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); Agan v. Vaughn, 119 F.3d 1538, 1549 (11th Cir. 1997), *cert. denied*, 523 U.S. 1023, 118 S.Ct. 1305, 140 L.Ed.2d 470(1998); Ashe v. Styles, 39 F.3d 80, 85 (4th Cir. 1994); Bobo v. Kolb, 969 F.2d 391, 399 (7th Cir. 1992); Tacho v. Martinez, 862 F.2d 1376, 1379 n.3 (9th Cir. 1988). Federal courts do not sit to correct errors made by state courts in the interpretation and application of state law. Bobo, 969 F.2d at 399. State courts are the final arbiters of state law, and federal courts may not second-guess them on such ratters. Agan, 119 F.3d at 1549.

Furthermore, even assuming this Court was empowered to review the accuracy of the state courts' finding of procedural default in this case, that finding would have to be upheld. Petitioner's challenge to Judge Altman's testimony is that the admission of this testimony violated petitioner's rights under the Due Process Clause of the United States Constitution. [Petition at 6.] The California Court of Appeal specifically found that this precise claim was not asserted at trial. [Respondent's Record E, Part 1, at 4-5.] That finding of fact is presumed to be correct unless petitioner rebuts the

presumption by clear and convincing evidence. 28 U.S.C. § 2254(e) (1). Petitioner cannot do so here.

Petitioner's federal due process claim, expressly framed as such, simply was never raised in the trial court, despite petitioner's vociferous arguments to the contrary. Petitioner contends, for example, that defense counsel challenged Judge Altman's testimony by motion *in limine* prior to trial. [Petition PRA at 16; Traverse P&A at 15.] However, the motion *in limine* argued that Judge Altman's testimony was irrelevant and prejudicial under the California Evidence Code — it made no mention of due process. [C.T. at 816-26.] The California courts do not recognize state law violations as being necessarily violations of federal constitutional due process. Ashmus, 54 Cal.3d at 985 n.15. In particular, the state courts treat evidentiary challenges under the Evidence Code as separate and distinct from constitutional evidentiary challenges. People v. Lucas, 12 Cal.4th 415, 462, 48 Cal.Rptr.2d 525 (1995), *cert. denied,* 519 U.S. 838, 117 S.Ct. 114, 136 L.Ed.2d 66 (1996).

Petitioner next argues that trial counsel made a motion for mistrial at the conclusion of Judge Altman's testimony. [Petition P&A at 16; Traverse P&A at 16-17.] In particular, petitioner points out that defense counsel challenged Judge Altman's testimony on the grounds that it amounted to "judicial misconduct," that it was "prejudicial," and that it was "so egregious that it denies the defendant a fair trial. So it's plain error." [Petition P&A at 16, citing to R.T. at 646, 650, 654.] Again, no mention was made of petitioner's due process rights under the Constitution.

In order to alert a state court to the federal nature of a given claim, at the very least a petitioner must refer to a specific federal constitutional guarantee in connection with that claim. Gray v. Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996).

Petitioner's counsel has made it eminently clear that he disagrees with this rule in the extreme, characterizing it as a requirement that trial counsel utter "a precisely worded incantation in the form of a prolix objection" [Petition at 4 n.4], and likening it to a formulation of the notorious chancery courts in Charles Dickens's *Bleak House* [Traverse P&A at 1-2]. Counsel's disgust notwithstanding, this rule is the law. If a defendant wishes to claim that the evidentiary ruling of a trial court denied him the due process of law guaranteed by the Fourteenth Amendment, he must expressly characterize his claim as such in the state court. Duncan v. Henry, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Petitioner failed to do so here.

Petitioner also relies on the fact that trial counsel filed a motion for new trial in which he argued that Judge Altman's testimony "effectively depriv[ed] the defendant of the U.S. Constitutional right to a jury trial," and resulted in an "unfair trial." [Petition P&A at 16-17, citing C.T. at 899, 910.] It is unlikely that such arguments effectively preserved an evidentiary challenge for appeal. *See* People v. Williams, 16 Cal.4th 153, 254, 66 Cal.Rptr.2d 123 (1997) (new trial motion does not preserve issue where contemporaneous objection is required), *cert. denied,* 522 U.S. 1150, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998); Lucas, 12 Cal.4th at 462 (evidentiary challenge raised in new trial motion "came too late"). In any event, such arguments did not expressly invoke the Due Process Clause of the Fourteenth Amendment.

Based on the record, petitioner cannot rebut with clear and convincing evidence the finding of the California Court of Appeal that he did not properly challenge Judge Altman's testimony in the trial court on federal due process grounds. Accordingly, this Court must find that petitioner's claim has been procedurally defaulted.

Petitioner's final argument in opposition to enforcement of the procedural default is that his claim, even if procedurally defaulted, should be heard under the cause and prejudice exception. [Petition P&A at 19-20.] A petitioner can obtain federal review of a procedurally defaulted claim if he can show "cause and prejudice." Coleman, 501 U.S. at 750. "Cause" is a legitimate excuse for the default. Magby v. Wawrzaszek 741 F.2d 240, 244 (9th Cir. 1984). "Prejudice" is actual harm resulting from the alleged constitutional violation. Id.

In this case, petitioner claims that the cause for his default was ineffective assistance of counsel — that is, trial counsel rendered deficient performance by failing to raise a constitutional objection to Judge Altman's testimony. [Petition P&A at 19-20.] Trial counsel's failure to preserve a claim for review in state court will suffice for cause where the failure was so serious a lapse as to amount to ineffective assistance of counsel in violation of the Sixth Amendment. Edwards v. Carpenter, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). However, the exhaustion doctrine "re[q]uires that a claim of ineffective assistance be presented to the state courts as an *independent* claim before it may be used to establish cause for a procedural default." Murray v. Carrier, 477 U.S. 478, 488-89, 106 S.Ct. 2639, 91 L.Ed.2d 297 (1986) (emphasis added). Petitioner did not exhaust his ineffective assistance claim in this case.

Petitioner protests that he did raise his ineffective assistance claim to both the Court of Appeal and the California Supreme Court. [Traverse at 6-7.] However, petitioner raised ineffective assistance before the Court of Appeal only in his Reply Brief in a short, two-sentence aside buried among his arguments challenging Judge Altman's testimony. [Respondent's Record D at 20.] The issue received similar treatment in the Petition for Review to the California Supreme Court. [Respondent's Record F at 8.]

In neither brief was there any discussion or argument in support of the ineffective assistance claim. Issues which are only perfunctorily asserted without supporting argument are not properly raised in the California appellate courts and will not be addressed. Rodrigues, 8 Cal.4th at 1116 n.20; Ashmus, 54 Cal.3d at 985 n.15. In any event, petitioner clearly did not raise his ineffective assistance argument to the state courts as an independent claim. As such, the claim is unexhausted and petitioner cannot rely upon it as cause for his procedural default.

2. Merits of Petitioner's Claim

Even assuming petitioner's challenge to Judge Altman's testimony was not procedurally defaulted, the claim would have to be denied on its merits. Despite respondent's assertion to the contrary [Return at 3-4; Return P&A at 17-18], this is a federal law claim. Petitioner clearly identifies his claim as arising under the United States Constitution [Petition at 6], and the federal courts do review challenges to state court evidentiary rulings under a constitutional rubric. *See, e.g.*, Kealohapauole v. Shimoda, 800 F.2d 1463, 1465-66 (9th Cir. 1966), *cert. denied*, 479 U.S. 1068, 107 S.Ct. 958, 93 L.Ed.2d 1006 (1987). However, even treated as a federal law challenge, petitioner's claim fails.

A petitioner for federal habeas relief may challenge an evidentiary ruling only on the grounds that it created an absence of fundamental fairness which fatally infected the trial. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897 (9ch Cir. 1996). That is, the petitioner must show that the evidentiary ruling rendered the trial so fundamentally unfair as to violate due process. Windham v Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998). The admission of evidence violates due process only when there are no permissible inferences the jury may draw from the evidence. Id. The petitioner bears the burden of overcoming the presumption that the evidentiary ruling

was correct and not violative of due process. Ortiz-Sandoval, 81 F.3d at 897. Petitioner has not met his burden here.

Most of the arguments raised and authorities cited by petitioner are simply irrelevant to this analysis. For example, petitioner goes to great lengths to cite authority for the proposition that it is structural, per-se-reversible error for a case to be tried before a jurist who is not impartial. [Petition P&A at 3-6.] Petitioner believes that having Judge Altman testify for the prosecution was tantamount to having his case presided over by a judicial officer with an interest in the case and, indeed, virtually resulted in a directed verdict of guilty. [Id.] This is the basis for petitioner's additional argument in Ground One that Judge Altman's testimony, besides violating the Due Process Clause, also violated petitioner's Sixth Amendment right to a trial by jury. [Petition at 6, 10.]

This is simply a poor analogy. The fact of the matter is that Judge Altman was not the presiding judge — he was a witness. It was clear to the jury that his function was to give testimony just like any other witness, and the trial court instructed the jury to evaluate his credibility just like any other witness. [R.T. at 1276-83.] Therefore, any claim that Judge Altman's testimony created a structural defect in the proceedings or somehow eliminated the role of the jury fails. Judge Altman's testimony does not give rise to such a claim.

Similarly, petitioner raises a series of arguments invoking the limitations under state law on the ability of judges to testify as witnesses. [Petition P&A at 6-12.] In particular, petitioner places great reliance on Merritt v. Reserve Insurance Co., 34 Cal.App.3d 858, 110 Cal.Rptr. 511 (1973), in which the California Court of Appeal held that, under California state law, it is improper for a judge to testify as an expert witness for one side in a civil trial regarding matters that took place before him in his judicial capacity. [Petition P&A at 6-7; Traverse P&A at 18.]

It should be noted that petitioner has misapplied state law, as Merritt is distinguishable on the grounds that it was a civil case. In fact, the California state courts have pointedly declined to extend the rule of Merritt to criminal cases. *See* People v. Fatone, 165 Cal.App.3d 1164, 1183-84, 211 Cal.Rptr. 288 (1985). In any event, failure to comply with a state's rules of evidence is neither a necessary nor sufficient basis for granting federal habeas relief. Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Indeed, the presence or absence of a state law violation is irrelevant. Id. at 919-20. This Court may consider only whether the admission of Judge Altman's testimony violated federal constitutional norms. Id. at 919.

It is clear that the very fact that Judge Altman testified, in and of itself, does not violate due process as there is no constitutional proscription on judges testifying in criminal matters. As one court has noted, "[t]he interests of justice would be served poorly indeed by such a rule, and... no court has even come close to adopting such a position." United States v. Frankenthal, 582 F.2d 1102, 1108 (7th Cir. 1978). Thus, the constitutional question turns on whether the substance of Judge Altman's testimony was a proper matter for the jury's consideration.

Petitioner, citing from the record, has compiled an extensive list of statements made by Judge Altman which petitioner characterizes as unfairly prejudicial. [Petition at 7-10; Petition P&A at 12-14; Traverse at 11-17.] Many of these statements were wholly innocuous, as they were merely descriptive of the proceedings in the Lopez case. For example, petitioner complains that Judge Altman made the following remarks:

- That he "removed the case from the jury." [R.T. at 576.]

- That defense counsel in the Lopez case "was trying to show that Dr. Chein was not the kind of person that he was portraying himself to the jury, that he did not have credibility and shouldn't be believed... [and] that the doctor didn't have any real experience in orthopedic surgery and the jury shouldn't necessarily accept what he had to say." [R.T. at 548-49.]

- That defense counsel in the Lopez case "was using the deposition in this other case to try to impeach Dr. Chein to show that Dr. Chein was not telling the truth when he said he had one location." That defense counsel was "using a prior statement of Dr. Chein to try to show that his current statement was a lie." [R.T. at 557-58.]

- That defense counsel in the Lopez case "was trying to point out how he had misled the jury." [R.T. at 572.] That defense counsel "asked these questions to try to show that this was a lie." [R.T. at 575.]

- That "later on on cross-examination when he was caught, he indicated that he hadn't done any surgery." [R.T. at 601.]

Petitioner further complains about the following statements by Judge Altman, which petitioner characterizes as gratuitous expressions of opinion:

- "I was definitely upset. There's no question I was upset about — when I found out what was going on... I was upset about what I thought was going on, yes." [R.T. at 625.]

- That petitioner's testimony in the Lopez case "offended" him. [R.T. at 626.]

- In responding to a hypothetical question about whether a witness tells the truth any less on cross-examination than on direct, Judge Altman responded, "Well, he's not supposed to. But obviously when a witness realizes that he's been caught because somebody has information which completely contradicts what the witness has said, the witness tends to start to waffle, to change, whatever. It's hard to keep to a story when the wrong evidence is there that you've lied." [R.T. at 581-82.]

- In responding to a question as to whether he referred the perjury case to the District Attorney because of his personal feelings, Judge Altman responded, "Absolutely not. If you want me to indicate why I referred it to the D. A., I will be happy to tell you at great length." [R.T. at 596.]

- When defense counsel objected to a long, ongoing answer by Judge Altman as being a narrative, Judge Altman responded, "I'll finish it," and proceeded to conclude his answer in three more sentences. [R.T. at 544.]

- When asked if he had any question whether petitioner had properly obtained a particular medical certification, Judge Altman responded, "Do I? Yeah, I really do. Do I have any question as to how he obtained it? Did he get a piece of paper? Yes. Do I have any question as to what he did to get the piece of

paper? Yeah, I've got questions." [R.T. at 594.]

- When asked if it was illegal to belong to a particular certifying organization, Judge Altman responded, "I don't know the answer, if it's illegal or not. I can tell you about it again if you want to know." [R.T. at 627.]

- Judge Altman described the board which certified petitioner as a "phony board." [R.T. at 545.]

- When asked about the significance of a doctor having multiple offices, Judge Altman responded, "[A]t some point, the argument is or the image is that the doctor runs a PI mill and that the doctor isn't [sic] just in medicine just making money and that the doctor is handling all personal injuries and workmen's compensation and then churning cases through the courtroom. That's the image that the lawyer was trying to bring out as to Dr. Chein. That's why the number of locations is material to the qualifications of the doctor." [R.T. at 555-56.]

Assuming that such statements could be deemed prejudicial, prejudice, in and of itself, does not violate due process. The critical inquiry is whether the statements in question rendered the entire trial fundamentally unfair, and clearly these statements did not.

In any event, petitioner's claim is not that individual statements made by Judge Altman should have been culled out and removed from the jury's consideration. Rather, his claim is that Judge Altman's testimony, taken as a whole, was

inadmissible. Therefore, petitioner must show that Judge Altman's testimony, in its totality, gave rise to no permissible inferences. Jammal, 926 F.2d at 520. He has made no such showing here and, indeed, cannot.

Judge Altman's testimony was highly relevant in this case in order to prove the elements of the offense. Under California law, in order to prove perjury, the prosecution must show that the defendant made a willful statement under math of a material matter which the defendant knew to be false. People v. Trotter, 71 Cal.App.4th 436, 439, 83 Cal.Rptr.2d 753 (1999). In this case, Judge Altman, as the presiding judge in the Lopez case, was well suited to testify as to what petitioner said under oath and why those statements were material; and, indeed, that was precisely the substance of Judge Altman's testimony.

In his testimony, Judge Altman first described the background of the Lopez case in order to place petitioner's testimony in context. [R.T. at 527-30.] Judge Altman then specifically described the testimony petitioner gave. [R.T. at 531-33, 537-40, 546-47, 548, 549-50, 551-555.] Judge Altman confirmed that petitioner gave his testimony under oath. [R.T. at 535-36.] Finally, Judge Altman explained why petitioner's testimony was material. [R.T. at 533-34, 540-46, 547-48, 548-49, 550, 555-59.]

Evidence does not violate due process where it is relevant to some fact of consequence and gives rise to some permissible inference. Windham, 163 F.3d at 1104. Here, Judge Altman's testimony was highly relevant to proving the elements of the offense, giving rise to the inference that petitioner had given materially false statements under oath. As such, there was no due process violation in the admission of Judge Altman's testimony.

C. Ground Two: Prosecutorial Misconduct

Petitioner next claims that the prosecutor committed unconstitutional misconduct during the course of the trial. Specifically, petitioner complains that the prosecutor implied, through statements made in front of the jury, that the Lopez case was in fact an insurance scam. [Petition at 10-17; Petition P&A at 23-29.] As with Ground One, respondent argues that this claim is unexhausted, procedurally defaulted, does not state a federal claim, and fails on its merits in any event. [Return at 13-17; Return P&A at 21-25.]

1. Exhaustion/Procedural Default

Respondent argues that petitioner did not exhaust his claim of prosecutorial misconduct because he presented this claim to the California courts as a state law claim rather than a federal due process claim. [Return at 13-14; Return P&A at 22.] However, as petitioner contends [Traverse at 17-18; Traverse P&A at 19-20], this argument fails. Petitioner presented his claim to both the California Court of Appeal and the California Supreme Court as a federal due process claim. [Respondent's Record D at 1; Respondent's Record F at 15.] Indeed, the Court of Appeal expressly recognized that petitioner was raising a federal claim. [Respondent's Record E, Part 1, at 12.] Petitioner has presented his claim to the highest state court and, as such, has exhausted his claim of prosecutorial misconduct.

Respondent argues in the alternative that petitioner's claim is procedurally defaulted. [Return at 14; Return P&A at 22-23.] The record supports this argument. In its Opinion denying the prosecutorial misconduct claim, the Court of Appeal ruled that this contention of constitutional error was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, and procedural default." [Respondent's Record E, Part 1, at 12.]

This finding, which clearly indicates a procedural default, is based on an independent and adequate state law ground. The rule in California is that the appellate courts will not entertain a claim of prosecutorial misconduct unless the claim has been preserved by means of a contemporaneous objection at trial. People v. Price, 1 Cal.4th 324, 447, 3 Cal.Rptr.2d 106 (1991), *cert. denied*, 506 U.S. 851, 113 S.Ct. 152, 121 L.Ed.2d 102 (1992). This rule is independent in that it is not interwoven with federal law. Furthermore, the contemporaneous objection requirement is adequate as it is regularly followed and consistently applied. See People v. Coddington, 23 Cal.4th 529, 595, 97 Cal.Rptr.2d 528 (2000) (collecting cases), *cert. denied*, 121 S.Ct. 1199 (2001).

It is true, as petitioner asserts [Petition P&A at 23], that the Court of Appeal, after finding a waiver, went on to address the merits of the federal prosecutorial misconduct claim in an alternative holding. [Respondent's Record E, Part 1, at 15-16.] However, this does not negate the default. The adequate and independent state ground doctrine requires a federal court to honor a state holding that is a sufficient basis for the judgment even where the state court also relies on federal law in an alternative holding. Harris, 489 U.S. at 264 n.10. Thus, the Court of Appeal found that the federal prosecutorial misconduct claim was procedurally defaulted. This finding was affirmed by the California Supreme Court in its silent denial of petitioner's application for review. [Respondent's Record E, Part 2.]

In opposition to the enforcement of the procedural default, petitioner argues that the Court of Appeal's finding of waiver was erroneous because his trial counsel did in fact raise constitutional objections to the prosecutor's conduct, both through oral objections during trial and through a new trial motion after the verdict. [Petition P&A at 23; Traverse P&A at 20-32.] However, the Court of Appeal's finding of procedural default was a ruling of state law which this Court

must respect. Harris, 489 U.S. at 264 n.10; Agan, 119 F.3d at 1549; Ashe, 39 F.3d at 85; Bobo, 969 F.2d at 399; Tacho, 862 F.2d at 1379 n.3.

Furthermore, a review of the record supports the Court of Appeal's ruling. Petitioner's trial counsel never expressly premised his objections to the prosecutor's conduct on federal constitutional grounds. [R.T. at 441, 442, 450, 468, 473, 477-84, 1246, 1303, 1238-43; C.T. at 896-911.] Accordingly, petitioner cannot rebut the state court's factual finding — that there was no constitutional objection at trial — with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Petitioner also argues that, even assuming his claim was procedurally defaulted, this Court should entertain the claim under the "cause and prejudice" exception. Specifically, petitioner asserts, as with Ground One, that if his trial attorney failed to preserve the constitutional claim by raising proper objections, then such failure constitutes ineffective assistance of counsel. [Traverse P&A at 32-33.] However, such an argument is unexhausted as petitioner did not raise an ineffective assistance claim in conjunction with his prosecutorial misconduct claim, in even a cursory fashion, at any time during the California state appellate proceedings. [Respondent's Record B at 37-48; Respondent's Record D at 22-27; Respondent's Record F at 15-20.]

In addition, petitioner asserts that his claim should be heard via the "miscarriage of justice" exception. [Traverse P&A at 33.] Besides the "cause and prejudice" exception, a petitioner may secure review of a procedurally defaulted claim if he can show that his conviction resulted in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750.

However, the miscarriage of justice exception applies only to the "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Thus, the exception is concerned with actual, as opposed to *legal,* innocence. Calderon v. Thompson, 523 U.S. 538, 559, 118 S.Ct. 1489, 150 L.Ed.2d 728 (1998). To be credible, a claim of actual innocence must be supported by new, reliable evidence — such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial. Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Petitioner offers no such evidence here. Accordingly, his claim of prosecutorial misconduct has been procedurally defaulted, and there are no exceptions permitting review.

2. Merits of Petitioner's Claim

Even assuming petitioner's claim of prosecutorial misconduct was not procedurally defaulted, the claim would have to be denied on its merits. Despite respondent's assertion to the contrary [Return at 13; Return P&A at 21-22], this is federal law claim. Petitioner clearly identifies his claim as arising under the Due Process Clause [Petition at 10], and the federal courts do review claims of prosecutorial misconduct under a constitutional standard. *See, e.g.,* Nguyen v. Lindsey, 232 F.3d 1236, 1240-41 (9th Cir. 2000). However, even treated as a federal law challenge, petitioner's claim fails.

The prosecutorial misconduct claim revolves around certain statements made by the prosecutor at trial. Based on the record in this case, it appears that one of the contentions of the defense in the Lopez case was that the Lopez plaintiffs' claims of injury were fraudulent and that the entire case was an insurance scam. [R.T. at 441-42.] At a number of points

during opening and closing statements, the prosecutor started to allude to the fact that fraud was an issue in the Lopez trial. [R.T. at 437, 440-41, 442, 450, 1245, 1246, 1248.] For the most part, each time the prosecutor made such a reference, defense counsel objected and the court sustained the objection. [R.T. at 437, 441, 442, 450, 1246.] However, petitioner now asserts that the prosecutor's repeated attempts to interject the issue of fraud into this trial amounted to unconstitutional prosecutorial misconduct.

A prosecutor has a duty to refrain from using improper methods to procure a conviction. U.S. v. Hill, 953 F.2d 452, 458 (9th Cir. 1991). The prosecutor's job is not just to win, but to win fairly, staying within the rules. U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993). Where a prosecutor obtains a conviction by over-stepping those rules, the conviction is subject to challenge based on prosecutorial misconduct. Id. However, to warrant relief, the misconduct must have been so egregious as to have infected the trial fatally, rendering it fundamentally unfair and denying the petitioner due process. Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995), *cert. denied,* 517 U.S. 1158, 116 S.Ct. 1549, 134 L.Ed.2d 651 (1996).

The Court should note that petitioner's claim relies, in part, on the assertion that the prosecutor elicited from Judge Altman inadmissible testimony to the effect that the Lopez plaintiffs' claims were fraudulent. [Petition at 14; Petition P&A at 26.] However, petitioner provides no citations to the record in support of this allegation, and an independent review of the record indicates that in fact there are none. Indeed, the only time Judge Altman alluded to the fact that fraud was an issue in the Lopez case was in response to questioning by petitioner's counsel on cross-examination. [R.T. at 589-90.] The prosecutor never elicited any such testimony. Thus, petitioner's claim must rely on these few, isolated incidents in opening and closing arguments when the

prosecutor alluded to the fraud issue in the Lopez trial. Those statements do not support a finding of prosecutorial misconduct.

Improper comments by the prosecutor in the presence of the jury may constitute prosecutorial misconduct. Darden v. Wainwright, 477 U.S. 168, 179-80, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). However, in order for a habeas petitioner to be entitled to relief, it is not enough that the prosecutor's remarks were undesirable or even universally condemned. Id. at 181. The standard of review for prosecutorial misconduct in federal habeas cases is the narrow one of due process, not the broad exercise of supervisory power. Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000), *cert. denied,* 121 S.Ct. 1630 (2001). Thus, the determinative inquiry is whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden, 477 U.S. at 181.

In determining that question, it is appropriate to consider whether the jury received any limiting instructions or other guidance from the court. Furman v. Wood, 190 F.3d 1002, 1006 (9th Cir. 1999). Here the jury received a great deal of guidance from the court. To begin with, nearly every time the prosecutor mentioned the issue of fraud in connection with the Lopez trial, defense counsel objected and the court sustained the objection with an admonishment to counsel. [R.T. at 437, 441, 442, 450, 1246.] Coupled with its general instruction to the jury to disregard stricken matters [R.T. at 431, 1272], these admonishments of counsel effectively neutralized any damage the prosecutor's statements might have done. United States v. Weitzenhoff, 35 F.3d 1275, 1291 (5th Cir. 1993), *cert. denied*, 513 U.S. 1128, 115 S.Ct. 939, 130 L.Ed.2d 884 (1995).

The court also gave the following curative instruction, limiting the jury's consideration of the prosecutor's comments regarding fraud:

> Also, yesterday, during the course of the opening statements, you heard mention of the words "fraud" and "set-up automobile accident," and this case does not involve your contemplation of any of these issues and you are to disregard and treat as though you had never heard any mention of any of those items.

[R.T. at 491.] Such curative instructions, as with prompt admonishments of counsel, are also deemed to negate any prejudice created by improper statements by the prosecutor. Weitzenhoff, 35 F.3d at 1291.

In addition, this Court must consider whether the trial court instructed the jury to decide the case solely on the basis of the evidence rather than on counsel's argument. Furman, 190 F.3d at 1006. Such instructions were given in this case. [R.T. at 428, 430, 435, 1269, 1271, 1272.] This Court must presume that the jury followed these instructions, thereby mitigating the feet of any misconduct. Drayden, 232 F.3d at 713.

Besides intervention by the trial judge, this Court must also consider whether the evidence against petitioner was strong. Furman, 150 F.3d at 1006. As will be discussed at greater length below, the evidence of guilt in this case was indeed strong. The statements given by petitioner under oath were demonstrably false and clearly material to the proceedings in which they were given. The strength of this evidence substantially reduced the likelihood that the jury's decision was influenced by the statements of the prosecutor. Darden 477 U.S. at 182.

Finally, the Court should note that it must view petitioner's claim of prosecutorial misconduct in the context of the entire trial. Weitzenhoff, 35 F.3d at 1291. In this regard, it is particularly relevant that *petitioner's own counsel* elicited from Judge Altman the following testimony to the effect that the Lopez plaintiffs were suspected of perpetuating a fraud:

> Q: So now, in the Lopez case, there was no actual surgery that took place, is there?
>
> A: Future surgery was recommended by Dr. Chein
>
> Q: Right. So the dispute was between an orthopedic doctor, Dr. Chein, and an orthopedic surgeon as to whether or not this person needed surgery, right?
>
> A: There was dispute as to whether the actual condition ever existed, whether it was a real condition or completely false condition. It was never disputed as to need for surgery. The defense position was the man had no injuries.
>
> Q: Well, that was the issues that was presented, isn't that right?
>
> A: That was –
>
> Q: The defense took the position there was never any injury, right?
>
> A: No injury.

> Q: And doctor – and the plaintiffs took the position there was injury that called for surgery, right?
>
> A: Yes.
>
> Q: So that was the dispute, right?
>
> A: The dispute was more basic. Now, you are oversimplifying it. There's a question when someone has an injury as to whether or not the proper treatment is surgery or something else. The defense position was that this was completely made-up situation, that there was no injury whatsoever, that there was not even a consideration of surgery.

[R.T. at 589-90.] Therefore, any statements by the prosecutor mentioning fraud cannot be deemed prejudicial given that petitioner's counsel himself interjected the issue into the proceedings through his questioning of Judge Altman.

Based on the foregoing, there can be no finding that the prosecutor's comments rendered petitioner's trial so fundamentally unfair as to deny him due process. Accordingly, petitioner's claim of prosecutorial misconduct must fail.

D. Ground Three: Sufficiency of Evidence

Petitioner's third contention is that the evidence against him was insufficient to sustain the conviction on the three perjury counts. [Petition at 17-21.] Respondent concedes that this is a federal claim which has been exhausted and has not been procedurally defaulted. [Return P&A at 26.] Therefore, the only issue with respect to this claim is whether it succeeds on its merits. It does not.

This claim was squarely raised before the California courts as a federal law claim [Respondent's Record B at 48-64; Respondent's Record F at 20-28], and the Court of Appeal addressed the claim on federal law grounds rather than an independent and adequate state law ground. [Respondent's Record E, Part 1, at 16-18.] As such, the standard of review delineated above applies and this Court may not grant relief unless the state court's decision was contrary to federal law, involved an unreasonable application of federal, or was based on an unreasonable determination of the facts. 28 U.S.C. 5 2254(d).

The Court of Appeal affirmed petitioner's conviction on all three counts of perjury, denying petitioner's claim of insufficiency of the evidence. [Respondent's Record E, Part 1, at 16-18.] With respect to each count of perjury, the court found that petitioner had given testimony, under oath, which clearly was demonstrated to be false. [Id.] The court further found with respect to each count that petitioner's false testimony was material to the outcome of the proceedings. [Id.] Accordingly, the court concluded that "[s]ubstantial evidence supports the judgment." [Id. at 18.] This finding comports with federal law.

Federal law governing constitutional claims of insufficiency of the evidence has been clearly established by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). There the Court held that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254, "the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 324. The court's task is not to determine whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Id. at 318-19. Furthermore, the court must respect the province of the jury to determine the credibility of witnesses,

resolve conflicts in the testimony, weigh the evidence, and to draw reasonable inferences from proven facts. Id. at 319. In addition, the court is not required to affirmatively rule cut every hypothesis except that of guilt. Id. at 326. The role of the habeas court is simply to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. at 319.

The Jackson standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. Id. at 324 n.16. Under California law, in order to prove perjury, the prosecution must show that the defendant made a willful statement under oath of a material matter which the defendant knew to be false. Trotter, 71 Cal.App.4th at 439. A falsehood is "material" if it could probably have influenced the outcome of the proceedings. People v. Pierce, 66 Cal.2d 53, 61, 56 Cal.Rptr. 817 (1967).It is no defense that the false statement did not in fact affect the proceedings — it is sufficient that it might have affected the proceedings. CAL. PENAL CODE § 123. Furthermore, a statement need not be directly related to a central claim in the case in order to be material. People v. Gamble, 8 Cal.App.3d 142, 146, 87 Cal.Rptr. 333 (1970). Testimony which impacts the credibility of a witness may be material. Id. Substantial evidence supports the elements of perjury in this case.

1. The "Specialty" Count

The basis for the first count of perjury of which petitioner was convicted was the following testimony given in the Lopez case:

> Q: And briefly, if you would explain to the jury what the difference is between an internship and a residency.

A: when one graduates from medical school, they cannot obtain a license to practice unless they have one year of internship in a hospital. And after one finishes the one year of internship, then they are entitled to get the California State license. When one gets that license, he's called a general practitioner or family practitioner. He can practice medicine but with no specialty. If a doctor wants to specialize in a field, then they have to spend another four to five years, depending on the specialty, in a program called residency, in a medical residency or specialty training program. Then he goes out and practices as a specialist.

Q: And did you receive your license to practice medicine?

A: Yes.

Q: You received your specialty qualifications?

A: Yes.

Q: What field was that specialty, sir?

A: Board certified in December 1988 by the American Board of Orthopedic and Neurological Surgery.

...

Q: Then when the residency ends, am I correct in layman's terms you are a regular doctor, right?

A: No. You are a specialist.

Q: You were a specialist following that –

A: Training period.

Q: – training period? And your specialty, what would be the correct designation?

A: Physical medicine and orthopedic surgery.

[R.T. at 538-40, 546-47; C.T. at 775-76.]

This testimony was given under oath. [R.T. at 531-32, 535-36.] Furthermore, evidence produced at trial demonstrated clearly that this testimony was false to the extent petitioner identified himself as a specialist in orthopedic surgery.

In order to designate himself as a "specialist," a doctor must complete a particular residency which is geared toward that specialty. [R.T. at 765, 522.] Indeed, petitioner himself indicated, in his testimony at the Lopez trial, that in order to be called a "specialist" in a certain field a doctor must spend four to five years in a residency program for that particular specialty. [R.T. at 539.] Thus, in order for a doctor to be called a "specialist" in orthopedic surgery, he must complete a four or five year orthopedic surgery residency program. [R.T. at 751-52, 771-73, 781, 783, 818.]

Evidence adduced at trial clearly demonstrated that petitioner does not have a specialty in orthopedic surgery. He did not do a residency in orthopedic surgery. [R.T. at 789,

595.] Rather, he did his residency in physical medicine and rehabilitation. [Respondent's Record A at 41-42; R.T. at 776, 815, 222.] A doctor who completes a residency in physical medicine and rehabilitation is not entitled to call himself a specialist in orthopedic surgery. [R.T. at 749-50, 783-84, 789, 797, 817, 858-60.] Three independent orthopedic surgeons, after reviewing petitioner's credentials, testified that petitioner is not a specialist in orthopedic surgery. [R.T. at 788- E9, 793-94, 891, 995.] In addition, Dr. Rene Cailliet, the chairman of the Department of Physical Medicine and Rehabilitation at the University of Southern California Medical School and the professor who directly supervised petitioner's residency, testified that petitioner does not have the proper training to call himself a specialist in orthopedic surgery. [R.T. at 822, 838.]

Petitioner's misrepresentation that he had a specialty in orthopedic surgery was material to the proceedings. In the Lopez case, the plaintiffs were alleging that they suffered from severe orthopedic conditions – thoracic outlet syndrome and carpal tunnel syndrome – as a result of the accident and that they required surgery. [R.T. at 543.] The severity of these orthopedic conditions was highly contested during the Lopez trial. [R.T. at 534, 589-90.] Petitioner testified on behalf of the Lopez plaintiffs in support of their contention that they suffered from ongoing injuries sustained in the accident. [R.T. at 530, 533-34.] The defense in the Lopez case countered petitioner's testimony with their own expert, who was in fact certified in orthopedic surgery. The competing testimony of the medical experts was critical to the jury's determination of damages. [R.T. at 534.] The jury's assessment of each expert's credibility depended, in part, on the doctor's credentials. [R.T. at 540-43, 560.] By misrepresenting himself as a "specialist" in orthopedic surgery, petitioner gave himself undue credibility in the eyes

of the jury in assessing the orthopedic condition of the Lopez plaintiffs. [R.T. at 542-43, 547.]

Therefore, petitioner's testimony was given under oath, was false and was material. Petitioner does not challenge that his testimony was willful. Furthermore, by the very nature of the testimony — petitioner's own specialty in medicine — there is no question that petitioner knew the testimony to be false. Petitioner does argue that his testimony was protected by the First Amendment. [Petition P&A at 32-33.] However, there is no constitutionally-protected right to commit perjury. United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). All of the elements of perjury were amply supported with respect to the "specialty" count.

2. The "Offices" Count

The basis for the second count of perjury of which petitioner was convicted was the following testimony given in the Lopez case:

> Q: Doctor, how many office locations do you have now?
>
> A: One
>
> Q: How many did you have on October 9th, 1989?
>
> A: One.

[R.T. at 551; C.T. at 774.3]

This testimony was given under oath. [R.T. at 531-32, 535-36.] Furthermore, evidence produced at trial demonstrated clearly that this testimony was false. As various business records show, at the time of his testimony in the Lopez case, petitioner in fact had offices in Van Nuys

[Respondent's Record A at 5, 16-22, 27-31; R.T. at 706-73], Beverly Hills [Respondent's Record A at 10-11, 23, 25, 35, 37; R.T. at 708], Carson [Respondent's Record A at 12-15, 33, 44, 47, 65, 84, 86-93], and Southgate [Respondent's Record A at 51, 54, 58]. In addition, petitioner had filed fictitious business statements with the Los Angeles County Clerk's Department for offices identified as the "Long Beach Orthopedic Medical Group," the "Valley Orthopedic and Neurological Medical Group," the "Glendale Orthopedic and Neurological Medical Group," the "Mission Hills Orthopedic and Neurological Medical Group," and the "San Bernardino Orthopedic and Neurological Medical Group." [R.T. at 707-08.] Indeed, petitioner himself testified in a deposition prior to the Lopez trial that he practiced out of offices in Beverly Hills, Southgate, Carson, and Long Beach. [R.T. at 553-54.]

Petitioner's misrepresentation that he had only one office location was material to the proceedings. As Judge Altman testified:

> The question of how many offices a doctor owns or runs is relevant to the kind of practice that that doctor has. A doctor can certainly have one office in Beverly Hills, a doctor can have another office and maybe he's busy- But at some point, the argument is or the image is that the doctor runs a PI mill and that the doctor isn't [sic] just in medicine just making money and that the doctor is handling all personal injuries and workmen's compensation and then churning cases through the courtroom.

[R-T. at 555-56.] Therefore, the number of offices petitioner had was material to the jury's assessment of his credibility as a doctor and medical expert.

Petitioner's false testimony was given under oath and was material. Again, petitioner's willfulness in testifying and his knowledge of his testimony's falsity cannot reasonably be disputed. The elements of perjury were supported with respect to the "offices" count.

3. The Interrogatory Count

The basis for the third count of perjury of which petitioner was convicted was petitioner's answer to an interrogatory in the Kancilia case. The particular interrogatory in question directed petitioner to provide the following information:

> (a) the name and ADDRESS of each school or other academic or vocational institution you have attended beginning with high school;
> (b) the dates you attended;
> (c) the highest grade level you have completed;
> (d) the degree received;

[C.T. at 772 Respondent's Record A at 96.] As part of his response to this interrogatory, petitioner gave the following answer:

> American University of Medicine, Florida 1979-1980, M.D.

[C.T. at 772; Respondent's Record A at 107.]

The answer was given under oath. [Respondent's Record A at 110.] Furthermore, petitioner's answer was false. He did not receive his medical degree from the "American University of Medicine, Florida." Rather, he received his degree from the American University of the

Caribbean School of Medicine in Montserrat, West Indies. [Respondent's Record A at 39, 113.]

Petitioner's false answer to the interrogatory was material to the proceedings. The response led the other side in the Kancilia case to believe that petitioner had attended a university in Florida between 1979 and 1980 and that he received his medical degree from such institution. [R.T. at 1031.] This was a significant distinction. Foreign medical schools, particularly those located in third world countries, are not highly regarded relative to American medical schools. [R.T. at 861-62.] The medical school at the American University of the Caribbean, in particular, does not have a good reputation within the medical community. [R.T. at 860-63.]

The background and professional credentials of petitioner were relevant in the Kancilia case. Dr. Kancilia was concerned that petitioner's background and professional experience would negatively impact his own practice or otherwise affect his business relationship with petitioner. [R.T. at 1030-31, 1032, 1063.] By averring that he received his medical degree from the "American University of Medicine, Florida," and concealing that he in fact received his degree from a school in the West Indies, petitioner painted a more flattering portrait of his educational background. [R.T. at 1062.] Furthermore, petitioner's failure to answer the question correctly affected his credibility. [R.T. at 1032, 1055, 1058, 1061, 1068.]

Thus, petitioner gave a false, material answer under oath in his response to the interrogatory. Petitioner does not contest that he answered the interrogatory willfully, nor does he contend that he did not know that his answer – the medical school where he received his degree – was false. Instead, petitioner argues that the trial court failed to instruct the jury on the element of delivery. [Petition P&A at 36-37.]

In a perjury prosecution where the perjury is committed in a document, an element of the offense is that the document be delivered by the defendant to another person with the intent that it be uttered or published as true. CAL. PENAL CODE § 124; People v Griffini, 65 Cal.App.4th 581, 76 Cal.Rptr.2d 590 (1998). In this case, the trial court did not instruct the jury to find that petitioner "delivered" his interrogatory answers. [*See* R.T. at 1291-92.] The Court of Appeal conceded that no such instruction was given and found that this was error on the part of the trial court. [Respondent's Record E, Part 1, at 23.] However, the court held that this error was harmless. [Id. at 23-25.] This holding was not contrary to federal law.

The omission of an element of a crime from a jury instruction is harmless error when the omitted element was uncontested and supported by overwhelming evidence. United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1197 (9th Cir. 2000). In this case, there was no dispute in the evidence concerning whether the false interrogatory answer was delivered. Mark Wuebben, counsel for Dr. Kancilia testified that he received petitioner's responses to the interrogatories by mail and, in fact, the responses themselves contain a proof of service. [R.T. at 1028; Respondent's Record A at 111.] Mr. Weubben physically brought the interrogatory responses he received in the mail with him to court. [R.T. at 1028.] There was no evidence introduced at trial that the interrogatory responses were not in fact delivered, and defense counsel never argued that the responses were not delivered. Hence, it was harmless error for the trial court not to give an instruction on delivery.

Based on the foregoing, there was ample evidence produced at trial supporting each element of perjury for all three counts of conviction. Thus, this Court cannot conclude that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The decision of the California

state courts was not contrary to, or an unreasonable application of, clearly established federal law; nor was it based on an unreasonable determination of the facts in light of the evidence presented at trial.

E. Grounds Four & Five: Instructional Errors

Finally, petitioner asserts that the trial court misinstructed the jury in two respects. In Ground Four, petitioner claims that the trial court erroneously failed to give a requested defense instruction informing the jury that ambiguous questions or answers cannot form the basis for a perjury prosecution. [Petition at 21-22.] In Ground Five, petitioner argues that the trial court erroneously instructed the jury that petitioner's testimony should be viewed with caution. [Petition at 22.] Respondent counters that these claims are unexhausted, do not state a federal question, and fail on the merits.

Respondent argues that the instructional claims are unexhausted because petitioner presented these claims to the California courts as state law claims rather than federal claims. [Return at 31, 33; Return P&A at 32-33, 35-36.] However, as petitioner contends [Traverse at 26-27, 29-30; Traverse P&A at 38-39, 41-42], the record belies this assertion. Petitioner cited to federal case law in support of his instructional error claims before both the Court of Appeal and the California Supreme Court. [Respondent's Record B at 64-67; Respondent's Record D at 36-37; Respondent's Record F at 28-30.] Furthermore, as presented to this Court, petitioner's jury instruction claims are federal law claims. Petitioner cites to the Due Process Clause as the basis of both claims, and the federal courts do apply due process analysis to instructional errors. *See, e.g.*, Patterson v. Gomez, 223 F.3d 959, 362-67 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 644 (2001). Nevertheless, even treated as exhausted federal

claims, petitioner's instructional error claims fail on their merits.

1. Ground Four: Ambiguity Instruction

In Ground Four, petitioner complains that the following instruction, although requested, was not given:

> If you should find that a particular question is ambiguous – that is, subject to more than one interpretation – and that the defendant truthfully answered one interpretation of the question, then such answer would not be false. Similarly, if you should find that the question was clear but the answer ambiguous, and one interpretation of the answer would be truthful, then such answer would not be false.

[Petition at 21.] The Court of Appeal affirmed the trial court's rejection of this instruction, finding that there was "nothing ambiguous in either the questions or answers related to the perjurious conduct here." [Respondent's Record E, Part 1, at 20.] The court further held that the jury instructions, taken as a whole, adequately informed the jury of the elements of perjury. [Id.] This ruling was not contrary to federal law.

A claim that a court erred in omitting an instruction requires a showing that the error so infected the trial that the resulting conviction violates due process. Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). In such cases, the petitioner's burden is especially heavy, as an omission is less likely to be prejudicial than an affirmative misstatement of the law. Id. at 155. Furthermore, in reviewing any alleged instructional error, the Court may not assess the instruction in artificial isolation, but must view it in the context of the instructions as a whole and the trial

court record. Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

In this case, there is nothing in the record to support petitioner's contention that either the questions asked of him, or the answers he gave, were ambiguous. With regard to the "specialty" count, petitioner was asked during the Lopez trial, "And your specialty, what would be the correct designation?" [R.T. at 547.] Petitioner answered directly, "Physical medicine and orthopedic surgery." [Id.] Similarly, with regard to the "offices" count, petitioner was asked, "Doctor, how many office locations do you have now?... How many did you have on October 9th, 1989?" [R.T. at 551.] To both questions, petitioner answered, "One." [Id.] Finally, with regard to the interrogatory count, petitioner was asked to identify the name and address of the medical school he had attended. [Respondent's Record A at 96.] In response, petitioner falsely identified the "American University School of Medicine" in Florida. [Respondent's Record A at 107.] None of these questions or answers is even arguably ambiguous. A defendant is entitled to have his theory of defense presented in the jury instructions only if it is supported by law and has some foundation in the evidence. United States v Mason, 902 F.2d 1434, 1438 (9th Cir. 1990). Here, nothing in the record supports petitioner's theory of ambiguity.

Furthermore, a trial court's failure to give an otherwise proper theory-of-the-defense instruction is not erroneous if the instructions actually given, taken as a whole, adequately encompass the defendant's theory. United States v. Sarno, 73 F.3d 1470, 1485 (9th Cir. 1995), *cert. denied*, 518 U.S. 1020, 116 S.Ct. 2555, 135 L.Ed.2d 1073 (1996). In this case, while the trial court did not give petitioner's proposed ambiguity instruction, it did give the following instructions on perjury generally:

If the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt.

....

Perjury requires that the statement be made willfully by a person who knows that the statement is being made under oath under penalty of perjury and who knows or believes that the statement is false.

A statement made under an honest mistake and in a belief that it is true is not perjury even though the statement is false.

....

In evaluating the questions and answers upon which charges of perjury are based, you may consider the entire context in which the questions are asked and the answers given, including other questions and answers given during the testimony. However, a perjury conviction may not be based upon an answer which is literally true although misleading or unresponsive.

A witness is not required to volunteer more explicit information unless asked or required to do so.

....

> The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any such specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent.

[R.T. at 1275, 1293-95.]

Taken together, these instructions effectively directed the jury how to consider any questions or answers that it found ambiguous. Thus, even assuming that the questions and/or answers were ambiguous, as petitioner contends, the jury was adequately instructed to take this into account. Therefore, petitioner's Ground Four fails.

2. Ground Five: Oral Admissions of the Defendant

In Ground Five, petitioner finds error in the trial court's giving the following instruction:

> Evidence of any oral admission of the defendant should be viewed with caution.

[Petition at 22.] Petitioner asserts that this instruction effectively directed the jury to view with suspicion

explanatory statements he made in his testimony in the Lopez trial — statements which, if properly considered, would have undermined any finding that he intended to lie about his specialty and the number of offices he had. [Petition P&A at 39-40.]

In evaluating this claim, the Court of Appeal found that the instruction was not necessary. [Respondent's Record E, Part 1, at 22.] The instruction at issue, based on CALJIC 2.71, is a cautionary instruction which admonishes the jury regarding its consideration of any incriminating statements ascribed to the defendant by a witness at trial. People v. Frye, 18 Cal.4th 894, 959, 77 Cal.Rptr.2d 25 (1998), *cert. denied,* 526 U.S. 1023, 119 S.Ct. 1262, 143 L.Ed.2d 358 (1999). In other words, the instruction protects a defendant against bias or imperfect recall when admissions of the defendant are admitted as unrecorded hearsay. Id. Here, where the prosecution was based entirely on the recorded testimony of petitioner in a previous trial, CALJIC 2.71 was not needed. However, the Court of Appeal found that the instruction was harmless as it did not direct the jury to view petitioner's exculpatory testimony with caution. [Respondent's Record E, Part 1, at 22.] This ruling complied with federal law.

To obtain relief based on a charge *given* to the jury, a federal habeas petitioner must establish not merely that the instruction was undesirable, erroneous, or even universally condemned, but that it violated some constitutional right. Cupp v. Naughten, 414 U.S. 141, 146, 95 S.Ct. 396, 38 L.Ed.2d 368 (1973). Thus, as with reviewing an omitted instruction, the central inquiry is whether a given instruction so infected the entire trial that the resulting conviction violated due process. Id. at 147.

To appreciate the harmlessness of the trial court's giving CALJIC 2.71, it must be viewed in context. The entire instruction, as read to the jury, provided as follows:

> An admission is a statement made by the defendant other than at his trial which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to *prove his* guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made an admission and, if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.
>
> Evidence of any oral admission of the defendant should be viewed with caution. However, no person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession made by him outside of this trial.

[R.T. at 1280.] [Emphasis added.]

Thus, contrary to petitioner's assertion, the instruction did not direct the jury to be suspicious of any statements made by the petitioner. By its own terms, CALJIC 2.71 applies only to those statements which tend to prove the defendant's guilt. The instruction simply does not encompass exculpatory statements and could not have been used against petitioner in the manner he alleges. Accordingly, the trial court did not violate due process in giving the instruction, and the decision of the state court was not contrary to, or an unreasonable application of, clearly established federal law.

III. RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered dismissing the Petition with prejudice.

Dated: May 22, 2001

[Signature]
ARTHUR NAKAZATO

Filed
Clerk, U.S. District Court

JUN 26 2001

CENTERAL DISTRICT OF CALIFORNIA
BY MC DEPUTY
[Stamp]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

EDMUND Y. CHIEN	)	Case No. CV 99-05296 (AN)
	)	
Petitioner,	)	
	)	ORDER APPROVING AND
v.	)	ADOPTING REPORT AND
	)	RECOMMENDATION
RICHARD SHUMSKY,	)	OF UNITED STATES
	)	MAGISTRATE JUDGE
Respondent.	)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the file, including the Magistrate Judge's Report and Recommendation, *de novo*. IT IS ORDERED:

1. The Report and Recommendation is approved and adopted.

2. Judgment shall be entered dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order and the Judgment on all counsel or parties of record.

DATED: June 25, 2001

[Signature]
AUDREY B. COLLINS

Filed
Clerk, U.S. District Court

JUN 26 2001

CENTERAL DISTRICT OF CALIFOR
BY MC DEPUTY
[Stamp]

UNITED STATES DISTRICT COURT

CENTERAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

EDMUND Y. CHIEN	)	Case No. CV 99-05296 (AN)
	)	
Petitioner,	)	
	)	JUDGEMENT
v.	)	
	)	
RICHARD SHUMSKY,	)	
	)	
Respondent.	)	

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice for the reasons set forth in the related Magistrates Judge's Report and Recommendation.

Dated: June 24, 2001

[Signature]
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDMUND Y. CHEIN, *Petitioner-Appellant,* v. RICHARD SHUMSKY, Chief Probation Officer LA County; CALIFORNIA STATE ATTORNEY GENERAL, *Respondent-Appellees.*	No. 01-56320 D.C. No. CV-99-05296-ABC OPINION

Appeal from the United States District Court
For the Central District of California
Audrey B. Collins, District Court Judge, Presiding

Argued and Submitted
April 2, 2002 – Pasadena, California

Before: Ferdinand F. Fernandez, Jonnie B. Rawlinson, Circuit Judges, and Edward F. Shea, *District Judge.

Opinion by Judge Rawlinson;
Partial Concurrence and Partial Dissent by Judge Shea.

---

* The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

COUNSEL

Charles M. Sevilla, Cleary & Sevilla, San Diego, California, for the petitioner-appellant.

Brentford Ferriera (brief) and Matthew G. Monforton, Deputy District Attorneys, Los Angeles, California, for the real party in interest, State of California.

OPINION

RAWLINSON, Circuit Judge:

Edmund Chein ("Chein") appeals the district court's denial of his habeas petition filed pursuant to 28 U.S.C. § 2254, challenging his conviction following a jury trial on three counts of perjury.

Chein asserts that he was deprived of his due process rights under law when: (1) the judge who presided over one of the underlying civil trials testified in Chein's perjury trial; and (2) the prosecutor repeatedly referred to the facts of the underlying case in violation of an express ruling by the court. Chein also contends that there was insufficient evidence to support the perjury convictions. Because Chein's due process claims were procedurally defaulted and there was sufficient evidence to support a finding of perjury as to one of the statements, we AFFIRM the district court's dismissal of Chein's habeas petition.

I. *Background*

Chein faced perjury charges as a result of his testimony in a personal injury trial and his response to an interrogatory in a different civil case.

Count 1 of the Information charged Chein with testifying falsely that "he was a specialist in orthopedic surgery."

Chein's specific testimony was this:

> Q: Then when the residency ends, am I correct, in layman's terms, you're a regular doctor; right?
>
> A: No. You are a specialist.

Q: You were a specialist following that —

A: Training period.

Q: —Training period? And your specialty, what would be the correct designation?

A: Physical medicine and orthopedic surgery.

. . .

A: If a doctor wants to specialize in a field, then they have to spend another four to five years, depending on a specialty, in a program called residency in a medical school affiliated hospital. And upon finishing that residency or specialty training program then he goes out and practices as a specialist.

Q: And did you receive your specialty qualifications?

A: Yes.

Q: What field is that specialty, Sir?

A: I'm board certified in December 1988 in — by the American Board of Orthopedic and Neurological Surgery.

Count 2 charged that Chein committed perjury when he testified that "he had one office location on October 9, 1989 and October 30, 1990 to November 2, 1990." Chein testified particularly as follows:

Q: Doctor, how many office locations do you have now?

A: One.

Q: How many did you have on October the 9th, 1989?

A: One.

These two counts stemmed from a personal injury trial where Chein testified as a treating physician.

Count 4 of the Information charged that Chein committed perjury when he testified "that he attended and received a medical degree from American University School of Medicine in Florida."

Chein provided the following response to an interrogatory:

"State:

a) the name and address of each school or other academic or vocational institution you have attended beginning with high school;

b) the date you attended;

c) the highest grade level you have completed;

d) the degree received."

Chein's response was "American University School of Medicine, Florida, 1979-1980 M.D."

The judge who presided over the personal injury civil trial testified during Chein's perjury trial. Although Chein filed a motion in limine prior to trial seeking exclusion of the judge as a witness, Chein failed to object to the judge's testimony at

testimony at trial on the same basis (violation of due process) that he now asserts on appeal.

Chein also objected to the prosecutor's delving into the facts of the underlying personal injury case. Despite the court's sustaining of Chein's objection, the prosecutor made several references to the facts of the underlying case. Chein objected to the references on relevancy grounds.

Chein appealed to the California Court of Appeal, which affirmed his conviction. The California Supreme Court denied Chein's petition for review. Chein then filed the federal habeas petition that is the subject of this appeal.

II. *Standard of Review*

Our review of the district court's decision to deny habeas relief is *de novo*. *Melendez v. Pliler*, 288 F.3d 1120, 1124 (9th Cir. 2002). The district court's factual findings are reviewed for clear error. *Id.* Under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, we will "grant habeas relief to a person in state custody only if the decision was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, or the claimed constitutional error resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* (citations omitted).[1]

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[1] Because the California Supreme Court issued a summary denial of Chein's Petition for Review, we review the California Court of Appeal decision as the last reasoned decision of the state courts. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

III. *Discussion*

A. *Procedural Default*

1. Testimony of the civil trial judge

Prior to the perjury trial, Chein filed a motion in limine objecting to the judge's appearance as a witness. Chein challenged admission of the judge's testimony on the bases of relevance and prejudice. Chein proferred no due process objection. In his motion for a new trial, Chein noted that admission of the trial judge's testimony resulted in an "unfair trial." However, Chein again failed to explicitly interpose a due process objection.

The California Court of Appeal ruled that Chein's constitutional challenge to the judge's testimony was "waived, forfeited, and procedurally defaulted" because Chein never raised constitutional objections before the judge presiding over Chein's perjury trial.

[1] In order to find Chein's claim procedurally defaulted, we must determine whether an "independent and adequate state [procedural] ground" exists to support the state's court procedural bar. *Bennett v. Mueller,* 296 F.3d 752, 755 (9th Cir. 2002). To constitute an adequate procedural bar, a state court procedural rule must be "clear, consistently applied, and well established at the time of the petitioner's purported default." *Melendez v. Pliler,* 288 F.3d at 1124 (citation omitted).

[2] We have previously ruled that California's "contemporaneous objection rule," which requires objection at time of trial to preserve an issue for appeal, is an adequate procedural bar. *See Hines v. Enomoto*, 658 F.2d 667, 673 (9th Cir. 1981). Our decision in *Melendez v. Pliler* is not to the contrary. In that case, we simply recognized that "there are no California cases holding that the [contemporaneous objection]

are no California cases holding that the [contemporaneous objection] rule is applied consistently in situations in which an objection *is* made but the trial court in its discretion declines to consider it on the merits." 288 F.3d at 1125 (emphasis in the original). In Chein's case, the trial court ruled on the merits of the objections made by Chein. Unfortunately for Chein, his objections at the time of the perjury trial did not include the due process challenge presented on appeal. Chein's failure to make a contemporaneous due process objection to the testimony of the trial judge bars pursuit of the due process challenge on appeal. The California Court of Appeal's ruling to that effect was not an unreasonable application of clearly established Supreme Court precedent on procedural default. *See Picard v. Connor*, 404 U.S. 270, 275-76 (1971) (finding that exhaustion of state remedies requires that a petitioner assert his constitutional claims in state court).

2. Prosecutor's reference to the facts of the underlying civil trial

Prior to the start of the perjury trial, the district court referred to rulings it had made off the record. In seeking to clarify the court's prior rulings, Mr. Chein's counsel stated:

> "As I understand the ruling, it basically was that the totality of the [personal injury] case, we are not going to retry it here . . ."

The Court replied:

> "I think we're very clear on that."

However, the prosecutor almost immediately delved into the facts of the underlying case:

[Prosecutor]:

> the two occupants of the limousine alleged personal injuries as a result of being rear-ended by the Plymouth.
>
> They sued the driver of the Plymouth and the employer of the driver of the Plymouth . . . In that personal injury lawsuit, there was testimony on each side. Every issue was contested. In fact, the very fact of whether or not the accident occurred was contested.
>
> . . .
>
> [The Court]:
>
> Please confine your remarks to the evidence of the charges before the court. We're not going to retry the civil matter.

The prosecutor continued:

> We will present to you evidence that this Defendant lied because he was an expert witness, in quotes, so to speak in the personal injury lawsuit that arose from that accident. There were issues, many issues in that lawsuit, and the [sic] were claiming resulted from the accident the lawsuit was about. One of the Plaintiffs testified as the first witness. After he testified on direct examination, you're going to learn from testimony at this proceeding that the defense attorney cross-examined him —

[Defense Counsel]:

> Objection Your Honor. *It's not relevant to this case.*

(Emphasis Added).

> Objection Your Honor. *It's not relevant to this case.*

(Emphasis Added).

[The Court]:

> Counsel, we're talking about trying another case. The issue is, were these statements true, are they true or not true. If you would confine your opening statement to that.

[Prosecutor]:

> Certainly.
>
> We are going to present to you evidence that there were other accidents that those plaintiffs were involved in; . . . that the defense that was being put on by the defense attorneys was that the entire accident was a setup, a scam.

[Defense Counsel]:

> Your Honor, I'm going to object. This has nothing to do with this case.

[The Court]:

> Sustained. Counsel, the complaint alleges statements of qualification, medical training and background. That's the issue.

[Prosecutor]:

> Objection, Your Honor. *That's irrelevant.*

[The Court]:

> Counsel, we've already discussed this matter. We're not going to go into that area. *That is not going to be relevant in this case.*

(Emphasis Added).

Following the completion of opening statements, defense counsel expressed "concern" about the prosecution's opening statement. The court chastised the prosecutor and expressed its inclination to instruct the jury to "disregard comments that this case may involve a set-up accident and/or fraud." The court agreed with defense counsel that "in labeling the operation as somehow fraudulent I think [sic] goes beyond the bounds of what you need to prove . . . the truth of these charges. *So it's probably not going to be relevant.*" (Emphasis Added).

True to his expressed intentions, the court gave the following curative instructive to the jury when court resumed the following day:

> . . . [Y]esterday, during the course of the opening statements, you heard mention of the words "fraud" and "set-up automobile accident," and this case does not involve your contemplation of any of those issues and you are to disregard and treat as though you had never heard any mention of any of those items.

Unfortunately, the prosecutor strayed from the judge's ruling yet again. During closing argument, the prosecutor made the following statement:

> you had never heard any mention of any of those items.

Unfortunately, the prosecutor strayed from the judge's ruling yet again. During closing argument, the prosecutor made the following statement:

> . . . If every case, every frivolous claim went to a jury . . . And wasn't that in fact the defense in the [personal injury] case, that the whole claim is bogus
> ...

[Defense Counsel]:

> Objection. I thought we had discussion about this.

[The Court]:

> We're not trying the [personal injury] case counsel
> ...

Once the jury retired, defense counsel noted for the record that "the problem [he] anticipated happened during the closing argument . . ." The court responded that it "admonished [the prosecutor] to move on."

The jury instructions contained the following statements of law pertinent to this claim:

1) [S]tatements made by the attorneys during the trial are not evidence;

2) Do not consider for any purpose any offer of evidence that is rejected by the court.

[3] As with his objection to the judge's testimony, Chein objected to the prosecutor's comments only on the basis of relevancy. As a result, Chein's due process challenge as to the prosecutorial misconduct assertion also falls victim to California's contemporaneous objection requirement. *See Hines*, 658 F.2d at 673 (recognizing that a habeas petitioner's failure to comply with a state's "contemporaneous objection" requirement results in procedural default).

[4] Because Chein's due process claims were procedurally defaulted, we AFFIRM the district court's denial of Chein's habeas petition on those grounds.

B. *Sufficiency of the Evidence*

There is sufficient evidence to support a conviction if, construing the evidence in the light most favorable to the prosecution, a reasonable juror could have found the essential elements of the crime beyond a reasonable doubt. *See United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002).

[5] Perjury occurs when an individual provides an answer to a question under oath, that is literally untrue, and not merely "misleading by negative implication." *Bronston v. United States*, 409 U.S. 352, 353, 359-60 (1973).

We have recently interpreted *Bronston* to preclude a perjury conviction if the allegedly perjurious answer is in response to a question that is "excessively vague or fundamentally ambiguous." *United States v. Culliton*, 300 F.3d 1139, 1141 (9th Cir. 2002) (citations and internal quotation marks omitted); *see Chia v. Cambra*, 281 F.3d 1032, 1037 (9th Cir. 2002) (stating that Ninth Circuit case law may be persuasive authority for determining what Supreme Court precedent is clearly established).

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In contrast, "[i]f we determine that the questions were only arguably ambiguous or not ambiguous at all," the perjury determination must be made by the jury. *Culliton*, 300 F.3d at 1141 (internal quotation marks omitted).

[6] The crime of perjury also contains a materiality element, the absence of which precludes a finding of perjury. *See People v. Kobrin*, 903 P.2d 1027, 1028 (Cal. 1995). With those strictures in mind, we examine the three counts of which Chein was convicted.

Count 1 of the Information charged Chein with testifying falsely that "he was a specialist in orthopedic surgery."

It is undisputed that Chein was board certified by the American Board of Orthopedic and Neurological Surgery. Although the relative credibility of Chein's certifying board was challenged, the fact of Chein's certification rendered his statement literally true, thereby precluding a finding of perjury under *Bronston*.

Additionally, the prosecution's witness conceded that whether Chein could call himself a specialist in orthopedic surgery was a matter of semantics. Specifically, according to the prosecution witness, "[i]t would be okay to say, 'I have training in orthopedic surgery,' but it would not be okay to say, 'I'm a specialist in orthopedic surgery . . .' " Even

you have on October 9th, 1989? To both questions, Chein replied, "One."

[7] Both questions were unambiguous, or at worst "arguably ambiguous," making it appropriate to leave the perjury determination to the jury. *See Culliton,* 300 F.3d at 1141 (citations omitted). Additionally, the number of Chein's office locations was material to his credibility as a treating physician in a personal injury case. A physician who operates out of a number of office locations is subject to the assertion that he functions as a "personal injury mill" rather than as a legitimate practitioner. *See* Louis J. Papa & Anthony Basile, *No-Fault Insurance Fraud: An Overview*, 17 Touro L. Rev. 611, 613 (2001) (referring to medical practitioners as potential participants in the "personal injury mill").

The evidence offered to prove the falsity of Chein's testimony on the number of his office locations was taken from Chein's deposition dated October 9, 1989. On that date, Chein gave the following testimony regarding his office locations:

> Q: Do you practice out of any other location at the present time?
>
> A: Yes.
> Q: What other locations?
>
> A: I have a Southgate location, a Carson location and a Long Beach location.

[8] Viewing the evidence in the light most favorable to the prosecution, a reasonable juror could conclude that Chein's testimony at trial that he only had one office location was materially false. *See People v. Post*, 114 Cal. Rptr. 2d 356, 361, 365 (Cal. Ct. App. 2001) (reviewing the evidence that was before the jury in order to determine whether a perjury conviction was supported by sufficient evidence); *Kobrin*, 903

Q: What other locations?

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[8] Viewing the evidence in the light most favorable to the prosecution, a reasonable juror could conclude that Chein's testimony at trial that he only had one office location was materially false. *See People v. Post*, 114 Cal. Rptr. 2d 356, 361, 365 (Cal. Ct. App. 2001) (reviewing the evidence that was before the jury in order to determine whether a perjury conviction was supported by sufficient evidence); *Kobrin*, 903 P.2d at 1031 (holding that the determination of materiality in perjury cases is a question of fact to be decided by the jury).

Count 4 of the Information charged Chein with falsely responding to an Interrogatory by averring that the medical school he attended was in Florida, when in fact the medical school was sited in the Caribbean. Chein responded that the schools' mailing address was in Florida and, therefore, his response was literally true. We need not determine whether Chein's statement was literally true, however, because even if false, the statement lacks materiality. This statement was made in the context of a contractual dispute between Chein and an associate regarding accounting practices in connection with patient files. There is no evidence in the record that the location of Chein's medical school was material to any of the issues in the case. Absent materiality, there is insufficient evidence to support a perjury conviction. *See Kobrin*, 903 P.2d at 1028.

IV. *Ineffective Assistance of Counsel Claim*

We agree with the district court that Chein's brief references to ineffective assistance in his Reply Brief to the California Court of Appeal and Petition for Review to the

[9] Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support only the perjury count set forth in Count 2 of the Indictment, which charged that Chein testified falsely regarding the number of office locations he had. Nevertheless, the existence of one sustainable perjury count renders Chein's conviction valid. *See United States v. Barron*, 172 F.3d 1153, 1160 (9th Cir.1999).[2] The state court's decision affirming Chein's conviction was not an unreasonable application of clearly established Supreme Court precedent. Accordingly, we AFFIRM the district court's dismissal of Chein's habeas petition.

AFFIRMED.

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[2] There was no suggestion in the record or during oral argument that Chein's sentence would have been different if he had only been convicted on one of the perjury counts.

SHEA, District Judge, Dissenting in part and concurring in part:

For Defendant Chein's claims of insufficiency of evidence to sustain his conviction, I concur with the majority that the trial evidence as to Counts 1 and 4 was insufficient to support convictions for perjury. However, I dissent from the majority's view of the sufficiency of the evidence on Count 2 and would reverse the district court's denial of Chein's petition for a writ of habeas corpus and remand to the district court with instructions to enter judgment granting a writ of habeas corpus directing the release from custody of Chein. This is surely the more desirable result for Dr. Chein but I find it necessary to also dissent on the following issue which would result in his being given a new trial, though one without a sitting judge testifying as an expert for the prosecution.

For Defendant Chein's claims of due process violation — permitting a sitting Superior Court judge to testify as an expert for the prosecution in a criminal case and the misconduct of the prosecutor — I would reverse the finding of procedural default, and remand to the district court with instructions to enter a judgment granting a conditional Writ of Habeas Corpus directing the release of Chein unless the State of California begins trial proceedings within 120 days of the issuance of the mandate.

I. DISCUSSION

It is unnecessary to recite a background of the case as it is fairly set out in the majority opinion. However, it may help with an understanding of the history of this case to note that Dr. Chein was called as a medical expert and treating physician by the plaintiff in a state court personal injury case. The judge presiding at that trial was so impressed by the cross examination of Dr. Chein that he took the case from the

issue of whether or not to charge Dr. Chein with perjury. CT 356, quoting from the personal injury trial at RT 206. The record does not provide any information as to whether the referring judge volunteered to be an expert witness on the issue of materiality of the targeted testimony or whether the county prosecutor requested him to do so. Regardless, he was called by the prosecution and over the objection of the defendant, was permitted to testify.

This dissent will discuss the two issues in reverse order beginning with the issue of procedural default.

A. *Procedural Default*

Moving directly then to the issue of procedural default, to sustain a finding of procedural default, the waiver of a constitutional claim must be based on independent and adequate state law grounds. Specifically, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The state law ground is "independent" if it is not interwoven with federal law. *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001). For the law to be "adequate," it must be "clear, consistently applied, and well-established" at the time of the purported default. *Calderon v. U.S. Dist. Ct.*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citations omitted), *cert. denied*, 520 U.S. 1204 (1997).

We have held that California's contemporaneous objection rule is independent and adequate in some cases. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 842-83 (9th Cir. 1995) (sustaining state court's finding of procedural default where defendant failed to make *any* objection at trial). However, the recent decision in *Melendez v. Pliler*, 288 F.3d 1120 (9th Cir. 2002), is instructive. "We held more than twenty years ago that

1120 (9th Cir. 2002), is instructive. "We held more than twenty years ago that the rule is consistently applied when a party has failed to make *any* objection to the admission of the evidence." *Id.* at 1125 (citing *Garrison v. McCarthy*, 653 F.2d 374, 377 (9th Cir. 1981). "However, there are no California cases holding that the rule is applied consistently in situations in which an objection *is* made but the trial court in its discretion declines to consider it on the merits." *Id.* Based on this distinction in the adequacy of California's contemporaneous objection rule, the rule is inadequate as applied to the facts of this case.

In a pre-trial motion, defense counsel moved to exclude the judge's testimony, and offered to stipulate to the factual events in the preceding personal injury case, arguing that the prosecution's use of the judge in the preceding personal injury trial as an expert on materiality was "highly prejudicial without any countervailing relevance." Excerpts of Record (hereinafter "ER") at 11, 181. This expert witness on materiality was the same judge who had referred to the prosecutor the question of whether specific testimony of Dr. Chein in the personal injury trial warranted prosecution for perjury. At trial, defense counsel properly objected to a series of flagrantly prejudicial statements in the prosecutor's opening and closing statements which were sustained.[1] Counsel also objected several times to extraneous comments from the judge testifying as to his opinion of the nature of the civil proceeding before him, which impinged generally on the Defendant's character, or his belief that the Defendant was lying.[2] The morning after the judge's testimony, counsel

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[1] These are contained in section III A. 2 of the majority opinion.

[2] For example, when asked whether the board which certified the Defendant was approved by the American Medical Association, the Judge responded "it's a phony board." Counsel's objection was overruled, but the Judge was instructed to respond either yes or no. ER at 97. Asked to explain an attorney's attempt to impeach Dr. Chein, after extensive comments, the Judge added:

testimony, counsel brought a motion for mistrial, making extensive comments on the problematic nature of the evidence. ER at 113-24. During argument on that motion, the prosecution raised the contemporaneous objection rule. ER at 119. In response, counsel stated "sometimes you have to object to preserve your right at that very moment, but sometimes it's a situation, especially with a judicial officer, where . . . testimony is of such a nature that it's so egregious that it denies the defendant a fair trial. So its plain error." ER at 121. The court took the motion under submission. ER at 124.

After the case was submitted to the jury, the court heard argument on Defendant's motion for a mistrial.[3] Counsel specifically stated that to have a judge express an opinion on materiality deprived the defendant "of the U.S. Constitutional right to a jury trial of that issue." ER at 12, 181. In the written motion, counsel argued that "the combination of [the judge's] testimony and the prosecutor's refusal to obey the court's simple rulings resulted in Dr. Chein receiving an unfair trial and he should be granted a new trial." ER at 14. Counsel argued that "I don't think he got a fair trial on the totality of the circumstances." ER at 182. The Court ruled that "I'm not persuaded that a new trial should be granted on the grounds that have been stated." ER at 183.

> deposition and he was obviously aware that there was different testimony from Dr. Chein—
>
> Mr. Braun: Objection, your honor, calls for conclusion.
>
> The witness: I'm sorry.
>
> The Court: all right.

ER at 102.

[3] It is unclear from the Excerpts of Record whether this was the same motion the court had earlier taken under advisement, or a subsequent motion for new trial.

totality of the circumstances." ER at 182. The Court ruled that "I'm not persuaded that a new trial should be granted on the grounds that have been stated." ER at 183.

When the violation involves fundamental constitutional rights such as those involved here, with *some* objections and motions explicitly stating the constitutional basis of the objections, the contemporaneous objection rule has not precluded the California Supreme Court from granting relief. *See, e.g., People v. Vera*, 15 Cal. 4th 269, 276 (1997) (permitting review of "certain fundamental, constitutional rights" despite lack of objection); *People v. Rodrigues*, 8 Cal. 4th 1060, 1132 (1994) (reviewing claim where failure to request jury instruction involved a "substantial right"); *People v. Livaditis*, 2 Cal. 4th 759, 775 n.3 (1992) (finding rule satisfied when defendant's general objections to evidence were overruled); *Hale v. Morgan*, 22 Cal. 3d 388, 394 (Cal. 1978) (liberally construing attempts to raise due process objection at trial); *People v. Blanco*, 10 Cal. App. 4th 1167, 1173 (1992) (noting discretionary consideration of due process claim when significant issue is raised); *People v. Truer*, 168 Cal. App. 3d 437, 441 (Cal. Ct. App. 1985) (finding discretionary review of constitutional arguments not raised below, where purely legal issue is raised). Faced with an unprecedented situation with a sitting state court judge called by the prosecution as an expert witness on the issue of materiality in a perjury case, the objections made by counsel were specific enough to fairly present the constitutional claims. Because Defendant did make general objections and a motion for mistrial, both identifying and implicating constitutional rights to a jury trial and to a fair trial, I would hold that procedural default does not apply to these claims and that on the merits the Defendant has been denied his right to a jury trial and to a fair trial as guaranteed by the Fourteenth Amendment.

I certainly do not criticize the judge in the personal injury case for referring the question of perjury to the prosecutor; presumably the judge believed it to be his duty. That said, the decision of the court in the criminal case to permit the trial judge from the personal injury case to be called by the state as an expert on the element of materiality in a perjury case was a fundamental constitutional error. In *Merrit v. Reserve Insurance Co.*, for example, the California Court of Appeals held:

> We think it prejudicial to one party for a judge to testify as an expert witness on behalf of the other party with respect to matters that took place before him in his judicial capacity. In such instance the judge appears to be throwing the weight of his position and authority behind one of two opposing litigants. The Evidence Code absolutely prohibits the judge presiding at the trial of an action to testify as a witness over the objection of a party. We think it only slightly less prejudicial when a judge expresses his opinion as a witness about events that occurred in an earlier trial over which he had presided.

Merritt, 34 Cal. App. 3d 858, 883 (1973). While *Merritt* addressed a judge's testimony given in a subsequent civil case, the danger of violation of fundamental constitutional rights is magnified when it is offered in a criminal case.

Similarly, in *Commonwealth v. Connolly*, 217 Pa. Super. 201, 204-06 (1970), the Pennsylvania Superior Court reversed a conviction where the defendant's credibility had been impeached by evidence of prior convictions, presented through testimony of the trial judge presiding over the prior cases. That court noted that typically evidence of prior convictions is introduced through records. *Id.* at 204. The defendant had stipulated to the admissibility of records of his prior

cases. That court noted that typically evidence of prior convictions is introduced through records. *Id.* at 204. The defendant had stipulated to the admissibility of records of his prior convictions. *Id.* Nonetheless, the trial court permitted the prosecution to call the trial judge to present this evidence, who stated that the defendant's case had been a "nuisance to him," and that he had a "minor altercation with defense counsel." *Id.* at 205. The Superior Court reversed the conviction for unfair prejudice, finding that the testimony impermissibly suggested that the defendant had a generally bad character:

> The jury would likely wonder why the witness specifically remembered this case out of the great number he had been associated with . . . [o]f course, the extraneous testimony complained of was not that of any witness, but that of an eminent judge. It was established before the jury that he was President and Administrative Judge, a jurist of long experience. If [defendant] was prejudiced by the testimony of any superfluous witness who volunteered objectionable comments, the prejudice was significantly multiplied by the speaker being a jurist of such magnitude. The present case was a close one, where the evidence was not overwhelming and a past conviction could easily have swayed the jury's decision. . . . In such a close case, where all the above factors coalesced, [defendant] was unduly prejudiced, and should be granted a new trial.

Connolly, 217 Pa. Super. at 205-206.

In this case, by calling the civil case trial judge as an expert on materiality, the State was permitted to elicit his education, training, experience as a lawyer and the fact that he was an experienced California Superior Court judge. Specifically,

95. A review of the judge's testimony presents a picture of an articulate and determined witness.[4] For example, the judge

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[4] The following line of questioning is illustrative:

> Q: By [the prosecution]: What is the materiality of the specific issue of specialization.
>
> A: [Witness]: I'm getting to— All Right. I'm Sorry. The specialization is obviously important because it relates to the witness' ability to convince the jury that the witness is correct.
>
> For example, if the case involves pediatrics, babies, and you happen to specialize in brain surgery and it involves a child's foot, who cares about your expertise in brain surgery? On the other hand, if the injuries involve orthopedics, the more specialization, expertise you have in orthopedic injuries becomes significant because in this case, the claimed damages were orthopedic damages.
>
> Mr. Lopez was claiming what's called a thoracic outlet's syndrome. He was also claiming carpel tunnel syndrome. Both he and his wife were claiming soft tissue injury which they still felt after six years and they both claimed to have traumatic stress disorders.
>
> So the fact that the doctor claimed to be a specialist in orthopedic surgery was obviously highly significant because these were purported to be severe orthopedic conditions allegedly requiring surgery in the case of Mr. Lopez who allegedly suffered from a rare orthopedic condition.
>
> Whether you are certified by the American Board of Orthopedic and Neurological Surgery is highly relevant because there is a thing in medicine called board certified. And once again, lawyers desperately want board certified doctors. But in order to be board certified in this case, by the
>
> American Board of Orthopedic Surgery—it sort of sounds like the American Board of Orthopedic and Neurological Surgery, but is dramatically different— you have to be specialized as an orthopedic surgeon with a lengthy history of surgery. You have to sit for two days of examinations. You have to undergo peer review—

judge interjected comments such as being upset "when I found out what was going on," referring to Dr. Chein's board certification "that wasn't the legitimate board . . . it was this outfit in Las Vegas," that it was a "phony board," and that Dr. Chein's testimony was offensive to him. ER at 97, 111-12. Discussing the impeachment of Dr. Chein in the civil case, the expert witness judge commented that it would "obviously indicate that the doctor didn't have any real experience in orthopedic surgery and that the jury shouldn't necessarily accept what he had to say." ER at 100.

Having lost his motion to prevent the judge from testifying, defense counsel did cross examine the judge and damaging testimony was elicited. In the motion for mistrial, counsel characterized impeachment of the judge as an impossible task. "I don't look forward to arguing this case quite frankly in front of this jury, pointing my finger toward [the judge] and calling him a liar and a judicial disgrace...." ER at 116. Further, counsel noted "it's not very easy to sit up and start dealing with a judge in front of a jury by objecting. . . . I don't think you can cure that . . . by an admonition about

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> American Board of Orthopedic Surgery—it sort of sounds like the American Board of Orthopedic and Neurological Surgery, but is dramatically different— you have to be specialized as an orthopedic surgeon with a lengthy history of surgery. You have to sit for two days of examinations. You have to undergo peer review—
>
> [Defense counsel]: Objection to the narrative, your honor. I think he's answered the question.
>
> [Witness]: I'll finish it.
>
> And so if you are board certified, it relates to, again, your ability to convince a jury.
>
> This is not the American Board of Orthopedic Surgery. It's a completely different outfit that sits in Las Vegas, Nevada.

Throughout the judge's testimony, his answers exceeded *the scope of the question, and violated the court's ruling* prohibiting testimony that the prior personal injury case was a "sham." Compounding this error, the prosecutor also violated the court's ruling by referring to the civil case as a fake accident at least five times in opening argument and predicting that the personal injury trial judge would testify that the entire civil case was "a setup, a scam." ER at 87. Despite that judge purportedly being called as an expert only on the issue of materiality, in closing argument, the prosecutor indicated that the judge believed the defendant was lying, and that the civil case was a sham, at least seven times.[5] ER 170-177. In doing so, the prosecution argued the judge's testimony as evidence of the defendant's guilt, as well as the judge's opinion of the defendant's character as a liar. Respectfully disagreeing with the majority, I would find that none of the trial court's curative instructions did or could overcome this combination of constitutional errors. Such is the mischief wrought by

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[5] In closing the prosecutor argued,

> Judge [is] not offended by the school. He's offended by the lies. . . thank God for judges who are so repulsed by lies . . . at the point in time that Edmund Chein told his lies, that judge was completely disgusted. . . . indeed we see that he was so disgusted by the lies that he heard . . . we also see what true bias is, not the kind of righteous indignation judge [ ] felt at outright lies. . . . [judge]'s reaction to what was going on in the Lopez case was not only something that he as a judge was given power to do— because judges have that authority to say there is no evidence here, this is a bogus case, this should not go to the jury. Judges have that power, to say the jury's not going to be offended or wasted... he had a moral obligation . . . to follow through with that feeling of outrage that he experienced at the continued lies in the case he was presiding over.

that none of the trial court's curative instructions did or could overcome this combination of constitutional errors. Such is the mischief wrought by permitting the prosecution to call a sitting judge as an expert witness in a criminal case.[6]

Defendant was willing to stipulate to the testimony in the underlying civil proceedings, and objected that permitting the judge to testify as an expert would unduly prejudice him. ER at 12, 181. In my view, it is the high probability that a jury, in such circumstances as these, will accept the judge's testimony as compelling a verdict consistent with that testimony and will abdicate its responsibility to make an independent evaluation of the evidence of guilt that requires a prohibition against such testimony. That is what happened here. To the extent that a sitting judge provides an imprimatur on the prosecution of the case through expert testimony, the state is relieved of its burden to prove each element of the offense beyond a reasonable doubt. Moreover, with the presence of the trial judge as an expert witness for the state, the deputy prosecutor undoubtedly felt additional pressure to win the case, which may have contributed to the prosecutorial misconduct in this case and these constitutional violations.

This is not to say that a judge may never testify as a *fact* witness for the prosecution in criminal proceedings. In the

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[6] The policy against judicial testimony is implicated any time a judge testifies. *See* Abramson, Leslie W., *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 977-78 (1996). Specifically, the judge may unfairly influence the fact finder, as "conferring the prestige and credibility of the judicial office on a litigant's position . . . the judge . . . appears to be 'taking sides.' " *Id.* Further, a "judge's testimony may be understood as an official testimonial . . . and receive undue weight from the jury." *Id.* "Moreover, an attorney should not have to balance the need for zealous cross-examination against the desire not to antagonize a judge who may preside in the attorney's future cases." *Id.*

unfairly prejudicial to defendant. *Id.* at 1108. In that case, the defense called a long-time family friend and attorney as a witness, to testify that he had given the defendant a legal opinion that monitoring telephone conversations of employees was not unlawful. *Id.* at 1104. If true, the testimony could have established a good-faith defense to wilfulness on one of the wiretapping counts charged. *Id.* at 1105. To impeach the witness, the government called the district judge previously assigned to the case to testify regarding an ex-parte meeting with the attorney, who had met with the judge to discuss postponing the trial date. *Id.* Instead of discussing scheduling, the attorney told the judge that he had a financial interest in the Defendant's business and stated that a trial would jeopardize negotiations for the sale of the business and bring financial harm to various companies and their employees. The judge thereafter wrote a letter of recusal to the parties in the case summarizing the conversation. *Id.*

At trial of the defendant, the judge was called to testify as a *fact* witness to impeach the attorney's credibility. On appeal, the Seventh Circuit found no unfair prejudice in the testimony of the judge. While acknowledging that "calling a judge to give testimony in any proceeding is a delicate matter," the court noted that the judge gave no testimony "as to anyone's character or reputation." *Id.* at 1108 (citing Canon 2 of the Code of Judicial Conduct, prohibiting voluntary testimony as a character witness). The defendant could have avoided impeachment by agreeing to strike the attorney's testimony, but refused to do so. *Id.* at 1107. Finally, the prosecutor made no improper use of the judge's testimony. *Id.* Given careful safeguards to protect the defendant's rights, there was no unfair prejudice, because the judge's testimony was limited to "factual knowledge that was highly pertinent to the jury's task, and he was the only possible source of that knowledge." *Id.*

In this case, by contrast, each factor absent in *Frankenthal* is present here. The judge, called as an expert on materiality by

highly pertinent to the jury's task, and he was the only possible source of that knowledge." *Id.*

In this case, by contrast, each factor absent in *Frankenthal* is present here. The judge, called as an expert on materiality by the prosecution, gave answers and interjections which presented a negative opinion of the Dr. Chein's character. The Defendant attempted to enter a stipulation to avoid the proposed judicial testimony, but those efforts were rejected. The prosecutor misused the judge's testimony in opening and closing argument by indicating that Dr. Chein was a "liar" and part of a "sham" proceeding, and attributing those views to the judge. Most importantly, the judge was called not as a fact witness, but as an expert for the prosecution. The state could have called any non-judicial expert on the issue of materiality, such as a law professor. Consequently, the judge was not the only possible source of testimony on the issue of materiality.

On habeas review of this case, "[the] issue is not whether introduction of [the evidence] violated state law evidentiary principles, but whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (citing *Reiger v. Christensen*, 789 F.2d 1425, 1430 (9th Cir. 1986)). Thus, a denial of due process is "the failure to observe that fundamental fairness essential to the very concept of justice... we must find that the absence of fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941) (admitting coerced confession into evidence violates due process).

The Defendant argues that the constitutional error in this case is structural error, and therefore not subject to harmless error analysis. I agree. Permitting a sitting judge to testify as

sitting trial judge to testify as an expert for the prosecution, about matters before him in a judicial capacity, violates the Defendant's fundamental right to a fair trial and to a jury trial. Here, when combined with the repeated prosecutorial misconduct in flagrant disregard for the rulings of the criminal case trial judge, it is my view that Dr. Chein, whatever his character, was denied his constitutional right to a fair trial by a jury. Accordingly, I would reverse the finding of procedural default and remand to the district court with instructions to enter a judgment granting a conditional Writ of Habeas Corpus directing the release of Chein unless the state of California begins trial proceedings within 120 days of the issuance of the mandate.

C. *Sufficiency of the Evidence*

As to the analysis of the sufficiency of the evidence as set out in the majority opinion, I concur that the evidence is insufficient to sustain conviction on Counts 1 and 4. However, as to Count 2, the alleged perjury regarding the number of offices, in my view, on the issue of whether or not the plaintiff in the personal injury case was injured and damaged in the incident in issue, it is immaterial whether Dr. Chein as his expert medical witness had one or more offices. Accordingly, I would hold that there was insufficient evidence to support conviction on any count and would reverse the district court's denial of Dr. Chein's petition for a writ of habeas corpus and remand to the district court with instructions to enter judgment granting a writ of habeas corpus directing the release from custody of Dr. Chein. However, at the least, Dr. Chein should receive a new trial on Count 2, one without the constitutional defect of a sitting judge as an expert witness for the prosecution.

Count 2, one without the constitutional defect of a sitting judge as an expert witness for the prosecution.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDMUND Y. CHEIN, *Petitioner-Appellant,* v. RICHARD SHUMSKY, Chief Probation Officer LA County; CALIFORNIA STATE ATTORNEY GENERAL, *Respondent-Appellees.*	No. 01-56320 D.C. No. CV-99-05296-ABC ORDER

Filed August 13, 2003

Before: SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

[1] Judge Fisher was recused.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDMUND Y. CHEIN, *Petitioner-Appellant,* v. RICHARD SHUMSKY, Chief Probation Officer LA County; CALIFORNIA STATE ATTORNEY GENERAL, *Respondent-Appellees.*	No. 01-56320 D.C. No. CV-99-05296-ABC OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
September 16, 2003 – San Francisco, California

Filed June 25, 2004

Before: Mary M. Schroeder, Chief Judge,
Diarmuid F. O'Scannlain, Pamela Ann Rymer,
Thomas G. Nelson, Michael Daly Hawkins,
M. Margaret McKeown, Kim McLane Wardlaw,
Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson,
And Richard R. Clifton, Circuit Judges.

Opinion by Judge Berzon;
Dissent by Judge O'Scannlain

COUNSEL

Charles M. Sevilla, Cleary & Sevilla, San Diego, California, for the petitioner-appellant.

Brentford Ferriera and Matthew G. Monforton, Office of the District Attorney, Los Angeles, California, for the respondents-appellees.

Cliff Gardner, San Francisco, California, for the amicus curiae.

OPINION

BERZON, Circuit Judge:

Dr. Edmund Chein was an expert medical witness in an automobile accident trial in California state court. He was also involved in a suit with a former business associate concerning the distribution of fees paid by patients. In both lawsuits he provided evidence — in the first instance trial testimony, in the second an interrogatory answer — that was misleading, at the least, concerning his medical credentials. At the instigation of the trial judge in the personal injury trial, he was charged in California state court with four counts of perjury and convicted of three. This habeas case raises various questions concerning the propriety of his conviction, of which we address only one.

Before plunging into the details of this perjury case, it is worth recalling "the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony." *Bronston v. United States*, 409 U.S. 352, 360 (1973). Underlying this limited role of perjury prosecutions is the "one consideration of policy [that has] overshadowed all others during the years

when perjury first emerged as a common-law offense: 'that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.' " *Id.* at 359 (citation omitted). Quoting a nineteenth century treatise to the effect that "the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts," *Bronston* held that intent to mislead, or actually misleading, a jury or other factfinder is not sufficient to make out the crime of perjury. *Id.* at 359. California law is the same. *In re Rosoto*, 519 P.2d 1065, 1071 (Cal. 1974) (holding that "failure to volunteer testimony to avoid the misleading impression does not constitute perjury," and citing *Bronston* approvingly).

These cautions apply with particular force to expert witnesses such as Chein. Although paid, usually well, for their efforts, such witnesses generally appear because they freely choose to do so, often with considerable immunity from subpoena. *See generally* Janet Fairchild, Annotation, *Right of Independent Expert To Refuse To Testify as to Expert Opinion*, 50 A.L.R.4th 680 (1986). Unless the strict requirements governing perjury convictions developed by the common law and applied by California are carefully applied, the willingness of experts to assist factfinders with the specialized knowledge needed to decide many cases, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), may atrophy.

As will appear, Chein undoubtedly did calculate the answers for which he was convicted in the hope that he would succeed in misleading the jury in the personal injury case and the opposing lawyer in the monetary dispute case. But, on careful review of the record, we conclude that no reasonable jury could have concluded that all the elements of

the crime of perjury were made out, and therefore reverse the denial of the habeas petition.

I.

Background

The allegedly perjurious statements that lie at the heart of this case were made during the course of two civil suits. The first was *Lopez v. Consolidated Freightways*, L.A. County Sup. Ct. Case No. WEC 105580 (1990), a personal injury case in which Chein testified as an expert witness for the plaintiffs. Chein was convicted for falsely testifying in *Lopez* that (1) "he was a specialist in orthopedic surgery" (the "specialist count"); and (2) "he had one office location on October 9, 1989 and on October 30, 1990 to November 2, 1990" (the "office count").

The information charging Chein with perjury details the relevant portions of his *Lopez* testimony concerning the specialist count:

> A. When one graduates from medical school, they cannot obtain a license to practice unless they have one year of internship in a hospital. And after one finishes the one year of internship, then they are entitled to get the California state license. When one gets that license, he's called a general practitioner or family practitioner. He can practice medicine but with no specialty. If a doctor wants to specialize in a field, then they have to spend another four to five years, depending on the specialty, in a program called residency, in a medical residency or specialty training program. Then he goes out and practices as a specialist.

Q. Did you receive your license to practice medicine?

A. Yes.

Q. You received your specialty qualifications.

A. Yes.

Q. What field is that specialty, sir?

A. Board certified in December 1988 by the American Board of Orthopedic and Neurological Surgery.

Q. Very good, Sir. And would you indicate if you — whether or not you engage in a regular day-to-day-day practice of medicine?

A. Yes, I do.

Q. And in what field, sir?

A. In orthopedics and neurology.

* * *

Q. Then when the residency ends, am I correct, in layman's terms, you're a regular doctor; right?

A. No. You're a specialist.

Q. You were a specialist following that —

A. Training period.

Q. — Training period? And your specialty, what would be the correct designation?

A. Physical medicine and orthopedic surgery.

The state has concentrated on Chein's statement that he was a specialist in orthopedic surgery at the time he finished his training as the perjurious one.

The second count of perjury relating to Chein's *Lopez* testimony, the office count, dealt with the number of offices Chein "had." He was charged with perjury for his responses to the following two questions:

Q. Doctor, how many office locations do you have now?

A. One.

Q. How many did you have on October the 9th 1989?

A. One.

Finally, Chein was convicted of one count of perjury (the "university count") related to his answer to an interrogatory in *Kancilia v. Chein*, L.A. County Sup. Ct. Case No. LC012300 (1992), a case in which Chein's former medical partner sued for an accounting of funds after the termination of their business agreement. The interrogatory read:

State:

a) the name and address of each school or other academic or vocational institution you have attended beginning with high school

b) the date you attended;

c) the highest grade level you have completed;

d) the degree received.

Chein's response was: "American University School of Medicine, Florida, 1979-1980 M.D."

Chein appealed his conviction to the California Court of Appeal, claiming (1) the expert witness testimony of Judge Robert Altman, the sitting state court judge who had presided over the *Lopez* case, amounted to a directed verdict and denied Chein a fair trial; (2) the prosecutor committed misconduct; (3) there was insufficient evidence to support his conviction; and (4) the jury instructions were improper. The Court of Appeal, in an unpublished opinion, affirmed the conviction. With regard to the sufficiency of the evidence issues we here address, the court held that the trial statements in *Lopez* were false, and were material because they "had a tendency to enhance the credibility of defendant," while the interrogatory answer in *Kancilia* was false and "was material to the outcome of the case because it went to his credibility both as a party to the lawsuit and as a physician in business with Dr. Kancilia." *People v. Chein*, No. B113514, at 18 (Cal. Ct. App. Nov. 25, 1998). Chein then filed a petition for review in the California Supreme Court, which was summarily denied.

Chein's timely habeas petition in federal district court pursuant to 28 U.S.C. § 2254 raised substantially the same claims presented to the California Court of Appeal. The habeas petition was denied.

On review of the district court's denial of habeas relief, we conclude that there was constitutionally insufficient evidence to support a guilty verdict on any of the perjury

counts for which Chein was tried. We therefore grant Chein's habeas petition. We need not and do not address Chein's other challenges.

II.

Standard of Review

We review de novo the rejection of the sufficiency of the evidence challenge that Chein raises in his habeas petition. *See Melendez v. Pliler*, 288 F.3d 1120, 1124 (9th Cir. 2002).

[1] Chein attacks his state conviction on the ground that there was insufficient evidence to find him guilty of perjury beyond a reasonable doubt, a challenge that was first made available to state prisoners seeking federal habeas review in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under *Jackson*, on habeas, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original). Put another way, the dispositive question under *Jackson* is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. On direct review, the California Court of Appeal considered and rejected Chein's sufficiency of the evidence challenge, citing the *Jackson* standard.

Because Chein's habeas petition was filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs our review. *See Arredondo v. Ortiz*, 365 F.3d 778, 781 (9th Cir. 2004). Under AEDPA, where a state court decides the merits of a petitioner's constitutional challenge, a federal court may grant habeas relief with respect to that claim if the state decision "was contrary to, or involved an unreasonable application of, clearly established

federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1) (2000), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

Two Ninth Circuit post-AEDPA cases have applied *Jackson* as written. They have not inquired whether the state court reasonably decided that a rational jury could have found the elements of the crime beyond a reasonable doubt. *See Davis v. Woodford*, 333 F.3d 982 (9th Cir. 2003) (applying *Jackson* to determine whether there was sufficient evidence to find premeditation beyond a reasonable doubt, *id.* at 992-94, even though the California Supreme Court had previously applied *Jackson* as to premeditation, *People v. Davis*, 896 P.2d 119, 143 (Cal. 1995)); *Turner v. Calderon*, 281 F.3d 851, 881-884 (9th Cir. 2002) (applying the *Jackson* standard in a case in which the state court did not expressly rely on *Jackson*). *But see Mitchell*, 107 F.3d at 1339 n.3 (holding that AEDPA did not apply, but assuming that if it did, deferential review of the state court's application of *Jackson* would have been appropriate).

The parties to this case and the original three judge panel assumed, without analysis, that *Jackson* applies as written. There has therefore been no briefing in this case, and no judicial analysis, concerning the proper intersection of *Jackson* and AEDPA, or whether it is § 2254(d)(1) or § 2254(d)(2) that applies to *Jackson* substantial evidence review under AEDPA. As will appear, we would reach the same result in this case were we to follow *Davis* and *Turner* or, instead, ask whether the California Court of Appeal reasonably applied the *Jackson* standard. We therefore do not consider the question concerning the impact, if any, of AEDPA on the *Jackson* standard

III.

Analysis

A.

General Principles

[2] The *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 442 U.S. at 324 n.16. Under California law, the elements of perjury are: "a willful statement, under oath, of any material matter which the witness knows to be false." [1] *Cabe v. Sup. Ct.*, 74 Cal. Rptr. 2d 331, 333 (Ct. App. 1998) (internal quotation marks omitted). Chein challenges the sufficiency of the evidence used to convict him on materiality and falsity grounds.

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[1] The California perjury statute, CAL. PENAL CODE § 118, provides, in pertinent part:

> (a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

1. Materiality

The jury at Chein's perjury trial was instructed that the legal standard for materiality is whether the statement in question "could probably have influenced the outcome of the proceedings." This standard is the one generally used by California trial courts, *see* CALJIC § 7.21 (1996 Revision), and finds support in California case law, *see People v. Wade*, 46 Cal. Rptr. 2d 645, 650 (Ct. App. 1995) (quoting *People v. Pierce*, 423 P.2d 969, 975 (Cal. 1967), *overruled on other grounds by People v. Kobrin*, 903 P.2d 1027 (Cal. 1995) (holding that materiality is an element of the crime to be determined by the jury beyond a reasonable doubt, and not a question of law for the court)).

[3] Importantly, when applying the materiality test, California law focuses not on whether, as a matter of historical fact, the false statement probably did influence the outcome of the proceedings, but instead on whether the false statement, at the time it was made, had the tendency to probably influence the outcome of the proceedings. *See, e.g.*, *People v. Poe*, 71 Cal. Rptr. 161, 164-65 (Ct. App. 1968). In other words, under California law, materiality is evaluated from an ex ante, not an ex post perspective. This fundamental rule of perjury law is codified in California Penal Code § 123:

> WITNESSES' KNOWLEDGE OF MATERIALITY OF HIS TESTIMONY NOT NECESSARY. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; *or* that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, *and* might have been used to affect such proceeding.

Id. (emphasis added).

As the dissent notes, *Kobrin*, an opinion directed only at the question whether the judge or jury determines materiality, stated the materiality standard in the introduction to the opinion in somewhat different language than that used in the jury instruction:

> [W]e conclude that a constitutionally valid perjury conviction under Penal Code section 118 requires the jury, not the court, to determine all elements of the charge including materiality, i.e., whether the statement or testimony "might have been used to affect [the proceeding in or for which it was made]." (Pen.Code, § 123; *see People v. Pierce*, *supra*, 66 Cal. 2d at p.61, 56 Cal.Rptr. 817, 423 P.2d 969.) We therefore reverse the contrary judgment of the Court of Appeal.

903 P.2d at 1028 (second alteration in original). It does not appear that this *dicta* in *Kobrin*, derived from California Penal Code § 123, purported to overrule earlier formulations of the materiality standard. The issue of the applicable standard (as opposed to the proper decisionmaker) was not before the court, and *Kobrin* cites approvingly to *Pierce*, at the very spot where the "could probably have influenced the outcome of the proceedings" standard is stated.[2]

People v. Feinberg, 60 Cal. Rptr. 2d 323 (Ct. App. 1997), a post *Kobrin* decision of the California Court of Appeal,

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[2] In section 123, the "might have been used to affect the proceeding" language seems not to be a definition of materiality but an *additional* requirement that materiality be judged *ex ante*, rather than as a question of how the false statement actually affected the trial. The statute, after all, says that a lie must *both* be "material, *and* might have been used to affect such proceeding." CAL. PEN. CODE § 123 (emphasis added) (quoted in full in text, *infra*). *Kobrin* had no reason to delve into the precise import of the just-quoted portion of section 123 and did not do so.

confirms that *Kobrin*, at most, textually reformulated the materiality inquiry without substantively lowering the standard:

> The test for whether a statement is material has been stated as "whether the statement or testimony 'might have been used to affect [the proceeding in or for which it was made]' " [quoting *Kobrin*] or "whether the statement could probably have influenced the outcome of the proceedings," [quoting *Pierce*].

Id. at 329 (first alteration in original). We are therefore satisfied that *Pierce*'s "could probably have influenced the outcome of the proceedings" standard was unchanged by *Kobrin*.

2. Falsity

The falsity element of the crime of perjury requires that a statement be literally false. Misleading and nonresponsive testimony that is literally true cannot support a perjury conviction. *See Cabe*, 74 Cal. Rptr. 2d at 336. As the California Supreme Court has stated:

> [W]hen . . . a witness' answers are literally true he may not be faulted for failing to volunteer more explicit information. Although such testimony may cause a misleading impression due to the failure of counsel to ask more specific questions, the witness' failure to volunteer testimony to avoid the misleading impression does not constitute perjury because the crucial element of falsity is not present in his testimony.

Rosoto, 519 P.2d at 1071.

To avoid confusion, we note before proceeding to apply these standards to Chein's case that our embedded application of California perjury law within federal habeas law creates the need to reference two distinct juries. Under *Jackson*, we ask whether any rational trier of fact could have found every element of the crime established beyond a reasonable doubt. In contrast, California perjury law inquires, for the purpose of establishing materiality, whether the allegedly false statement "could probably have influenced the outcome of the proceedings." *Pierce*, 423 P.2d at 975. The state's theory of liability for all three counts is that Chein's allegedly false statements "could probably have influenced the outcome" of the *Lopez* and *Kancilia* cases by unduly augmenting his credibility with the juries in those previous cases. We therefore find ourselves looking through the eyes of rational juries everywhere (under *Jackson*) to decide how the *Lopez* and *Kancilia* juries would have evaluated Chein's credibility.

With these understandings of California perjury law and of the task before us in mind, we turn to the specific counts on which Chein was convicted.

B.

The Specialty Count

On the specialty count, Chein was charged with falsely testifying that the specialty in which he was trained was "physical medicine and orthopedic surgery." To evaluate the accuracy of Chein's testimony, the following relevant facts were adduced at trial: Chein is a practicing doctor. The title of Chein's residency program at the University of Southern California was "physical medicine and rehabilitation." Although physical medicine includes training in orthopedic surgery, and Chein received such training during his residency, the focus of Chein's residency was not orthopedic

surgery, and, as Chein himself testified, he has not performed surgery since his residency. Chein is certified by the American Board of Orthopedic and Neurological Surgery, an institution that has not been approved by the American Medical Association.

Several doctors specializing in orthopedics and orthopedic surgery testified as to whether Chein was a "specialist" in orthopedic surgery. The expert testimony was generally consistent on two points: (1) doctors would not, as a matter of practice, have referred to Chein as a specialist in orthopedic surgery upon completion of his residency; and (2) Chein satisfied one American Medical Association (AMA) definition of a specialist, namely, "a physician with advanced training and knowledge of a particular branch of medicine or surgery."

Given this evidence presented at trial, there are at least two respects in which Chein's "specialty" testimony may have been literally true under *Rosoto*: He has been certified by the American Board of Orthopedic and Neurological Surgery, and, as the prosecution experts generally conceded, he satisfied the AMA definition of "specialist" quoted above, which only requires advanced training in a particular field.

Supporting the jury's finding that at least one of Chein's specialty statements was not literally true, however, is the convention among doctors to describe the specialty in which one is trained according to the designation of the residency, which in Chein's case, was physical medicine and rehabilitation, not orthopedic surgery. A rational jury could quite possibly have found the falsity element of the crime of perjury satisfied, because Chein's statement that when he completed his residency he was a specialist in orthopedic surgery breached professional convention.

[4] We need not, in the end, decide whether the jury's conclusion regarding literal truth on this count is inconsistent with the *Jackson* standard, as Chein's statement that he was a specialist in orthopedic surgery could not reasonably be found material beyond a reasonable doubt. Granting the element of falsity for purposes of our materiality analysis, Chein testified that he was a specialist in orthopedic surgery when he completed his residency, when he was in fact a physical medicine and rehabilitation specialist at that time. The distinction had no material significance in the context of the *Lopez* trial.

[5] Under *Jackson*, we ask whether any rational trier of fact could find that materiality was proved beyond a reasonable doubt. 443 U.S. at 319. Again, as *Jackson* requires us to perform this analysis with explicit reference to California law, *id.* at 324, our inquiry, precisely stated, is whether any rational trier of fact could find beyond a reasonable doubt that Chein's testimony that he was a specialist in orthopedic surgery "could probably have influenced the outcome" of the *Lopez* trial. CALJIC § 7.21 (1996 Revision).

Lopez was a personal injury case in which Chein testified as an expert witness that the plaintiffs would require orthopedic surgery. The *Lopez* plaintiffs had not undergone surgery at the time their personal injury suit went to trial. Thus, Chein's testimony reflected his medical prediction about the need for surgery. As Dr. Cailliet testified on direct examination, "[A]lthough we [non-surgeon orthopedic doctors] know the needs for, the demands for and the specificity of surgery, we per se could not perform surgery." Chein, quite obviously, did not *perform* surgery on the Lopezes, nor did he testify concerning the performance of surgery, as would have been required, for example, in a

malpractice case concerning surgery gone bad. He was simply asked whether surgery was indicated.[3]

Dr. Cailliet testified that physicians of physical medicine and rehabilitation can also be identified as physiatrists or nonsurgeon orthopedic doctors, and that a further difference between such doctors and orthopedic surgeons is that orthopedic surgeons decide what *type* of surgical procedure should be performed. However, there is no evidence suggesting that the precise *type* of surgical procedure among the available options for the Lopezes' supposed maladies was a material issue during their personal injury trial, particularly given the *Lopez* defendant's position that no injury was sustained at all, *see infra*.

Whatever differences may exist between the apparent credibility of orthopedic surgeons and non-surgeon orthopedic doctors must be viewed in the context of the *Lopez* trial, and, particularly, in light of Chein's testimony that he had not practiced surgery in the five years since his residency. Thus, the more appropriate materiality inquiry is

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[3] We reject the dissent's attempt to marry California perjury law with California's law governing expert witness testimony to develop a novel per se rule that "under California law, an expert witness's credentials are *inherently* material to his or her testimony." *Post* at 8578. There is no suggestion in the California cases that the normal materiality inquiry is held in abeyance when dealing with expert witnesses

The dissent then proceeds to suggest that Chein may have been precluded from offering his opinion had he accurately stated his credentials. There is no basis for this suggestion. Judge Altman did not so testify, even though, on that point, he was a percipient witness as the judge responsible for the decision. Moreover, the case did not concern the performance of any orthopedic surgery. Dr. Chein's actual, quite considerable specialty credentials were adequate to qualify him as an expert on the extent of physical injury and the likely need for surgery.

whether the difference between (1) a person trained as an orthopedic surgeon who has not operated since his residency, and (2) a non-surgeon orthopedic doctor who participated in twenty orthopedic surgeries during his residency but has not participated in any surgeries since his residency is sufficient to support a perjury conviction.[4] We believe it is not. Put another way, the *Lopez* jury could not "probably" have determined a dispute regarding the relative credibility of two medical experts testifying about the need for future surgery based on the difference between Chein's actual credentials and his testimony concerning the nature of his residency training. Rather, with or without Chein's embellishment, the opposing expert, with many years of practice as an orthopedic surgeon, was much better qualified if, but only if, expertise in performing surgeries were deemed pertinent by the *Lopez* jury.

[6] Further adding to the reasonable doubt regarding the materiality of any literal falsity in Chein's testimony concerning his training as a specialist that a rational jury would have encountered at Chein's trial was Judge Robert Altman's testimony that the need for surgery was not really at issue during the *Lopez* litigation. The *Lopez* plaintiffs alleged that the car accident that had given rise to the lawsuit

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[4] The dissent's "Nobel Prize in Medicine" example is therefore not helpful. Our analysis hinges, in part, on the fact that the credibility enhancement Chein received, if any, was insignificant. Claiming to be a Nobel Prize-winning doctor, as opposed to the ordinary, albeit specialist, doctor he was *could* have been material. A jury is considerably more likely to believe a doctor in a pertinent field who has achieved the pinnacle of recognition available in a career in medicine than one who has no awards or prizes attesting to his unique brilliance. On the other hand, if it were made clear that the Nobel Prize was for work bearing no relationship to the issues in the case — if the award was for psychiatry or dermatology, for example — then the assertion would indeed be immaterial, as would be a false claim by a medical expert that he had won an Oscar for acting.

caused them substantial physical injury. By contrast, the *Lopez* defendants adopted the position that the plaintiffs in that case suffered no injury at all, and that the entire lawsuit was a sham. Given this substantial discrepancy in the positions taken by the parties in the *Lopez* case, the relatively insignificant difference between the injury diagnosis of an orthopedic surgeon and the injury diagnosis of a physical medicine and rehabilitation doctor who had advanced, albeit limited, training in orthopedic surgery cannot sustain a perjury conviction. No rational trier of fact could have found materiality beyond a reasonable doubt.[5]

C.

The Office Count

On the office count, the state's position is that during the *Lopez* trial, Chein falsely testified that he "had" only one office. The cross-examining attorney impeached Chein's testimony on that point by reading from the transcript of a

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[5] Our result would be no different if we viewed this case through the § 2254(d)(1) prong of AEDPA. The California Court of Appeal decided otherwise in one sentence: "The jury could reasonably conclude defendant's testimony was material to the outcome of the Lopez case because it related to his ability to convince the jury that his testimony was credible regarding the plaintiffs' alleged injury." This analysis is unreasonable in two respects: First, the state court addressed none of the uncontested evidence discussed in the text that shows that in the context of the issues before the jury, the difference between his actual credentials and his stated credentials were minor. Second, the California court also did not address Judge Altman's testimony that Chein's credibility as an expert witness was only marginally at issue, because the *Lopez* defendants had taken the position that no accident had occurred at all. As a result, the Court of Appeal's opinion cannot and does not explain how a rational jury could have found that Chein's alleged falsehood "could probably have influenced the outcome" of the *Lopez* trial. *Pierce*, 423 P.2d at 975.

prior deposition. In that testimony, Chein stated that he practiced out of several offices: He was the sole practitioner at a Beverly Hills location, and he practiced with other doctors and chiropractors at locations in Southgate, Carson, and Long Beach.

[7] Chein maintains that his statement that he only "had" one office was literally true because he only "owned" one office, although he practiced out of several. A jury could quite reasonably have disbelieved this contention. The business records admitted at trial strongly suggest that Chein actually owned the other offices, and the deposition transcript with which he was impeached at the *Lopez* trial documents Chein as having previously testified that the Southgate, Carson, and Long Beach offices "are under my own name." While some doubt persists as to whether Chein actually ran the other offices or just worked at them, a rational jury could have found beyond a reasonable doubt that Chein's testimony about the number of offices he "had" was false.

The only evidence introduced by the prosecution to demonstrate the materiality of Chein's statement that he only "had" one office was the testimony of California Superior Court Judge Robert Altman, who presided over the *Lopez* case. Judge Altman testified not only as a percipient witness, but also as the state's "expert" on materiality.[6] When asked

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[6] That Judge Altman, a sitting state court judge, testified not only as a percipient witness to the events that transpired before him but also as the state's expert witness on the element of materiality is the basis of a separate due process challenge raised by Chein. Although we do not reach the merits of that challenge, the likely impact on the jury of a sitting state court judge pronouncing the existence of an essential element of a crime, while vigorously denouncing the defendant and his credentials, is difficult to ignore. Without deciding whether the admission of Judge Altman's testimony amounted to a due process violation, we note that this highly unusual testimony at least explains why the jury returned a guilty verdict on sparse, constitutionally insufficient evidence.

during direct examination about the materiality of Chein's statement regarding the number of offices he "had," Judge Altman stated:

> The materiality is — the question of how many offices a doctor owns or runs is relevant to the kind of practice that that doctor has. A doctor can certainly have one office in Beverly Hills, a doctor can have another office and maybe he's busy. But at some point, the argument is or the image is that the doctor runs a PI [personal injury] mill and that the doctor isn't just in medicine just making money and that the doctor is handling all personal injuries and workmen's compensation and then churning cases through the courtroom.
>
> That's the image that the lawyer was trying to bring out as to Dr. Chein. That's why the number of locations is material to the qualifications.

[8] As far as appears in the record, Judge Altman had no basis for determining "why" the lawyer in the *Lopez* case was interested in the number of offices Chein "had." Judge Altman as neither a percipient nor an expert witness as to the ental state of the *Lopez* defense lawyer. Nor did the prosecution provide any objective basis for divining the defense's reason for demonstrating that Dr. Chein, like many doctors, practiced from several offices. Lacking any basis other than Judge Altman's bare, unsubstantiated assertion for drawing a connection between lack of credibility and "having" several offices, no reasonable juror would rely on the quoted language alone as evidence beyond a reasonable doubt that a doctor who practices out of several offices is less credible than a doctor who practices from a single office.

Indeed, Judge Altman himself did not stand on the proposition that doctors who, for the convenience of their

patients, arrange to see them in multiple locations are not to be believed with regard to their medical evaluations. Rather, Judge Altman later clarified that his testimony regarding the materiality of several offices was intended to bolster a quite independent assertion: that Chein lacked credibility because he had never in fact examined the *Lopez* plaintiffs. Thus, Judge Altman testified as follows:

> [Dr. Chein] said he had different offices that were in his name and he practiced at different locations in his name. And then, again, on cross-examination, when he realized that the defense was armed for bear as they were armed for bear, they — he started talking about he just worked there, even though they were in his name, he didn't see patients.

In fact, as far as the present record shows, Dr. Chein never said he did not see patients at the other locations. Instead, after confrontation with his deposition testimony regarding his other offices, Dr. Chein testified: "I do not have other offices. I work for those people. When I am short of money, I do extra work including emergency room. If I work for Cedars, don't tell me I own Cedars." So on this point, Judge Altman's testimony was squarely refuted by material from the *Lopez* transcript read to the *Chein* jury.

That Judge Altman's assertion regarding the materiality of the number of offices depended on his understanding that the additional offices were not used for seeing patients became more patent on cross examination:

> Q. Now, Let's talk about the number of offices.
>
> A. Uh-huh.

Q. Now, is this a snobby thing like what law School did you go to or what medical school or is this a class thing that —

A. No. I think that there comes a point where people realize that if a doctor has multiple offices, that certainly it's arguable that the doctor is running a mill, that the doctor is just seeing *or not seeing patients* and writing reports and billing people and sending them to court because that is the way the world works. But there are doctors who have multiple locations that are perfectly legitimate; isn't that correct?

A. Yes, there are. Not too many that have four and five that I know of. I mean I've heard of doctors having one or two, but when it reaches a point of three and four, you know, you read about some of their credentials, they have multiple offices, I don't know what they do, but one has to suspect.

Q. Some doctors — let's take internists. They may have three or four offices; isn't that correct?

A. Not too many that I know. I don't know any.

Q. For example, Michael Gottlieb —

* * *

A. I've heard the name and I know there are doctors that have multiple offices who are legitimate. I think there are some doctors,

yeah, like Dr. Gottlieb that can have multiple offices who are legitimate.

Q. Not only legitimate, but world reknown [*sic*], right?

A. I don't know the answer to that question.

Q. Dr. Gottlieb discovered the AIDS disease?

A. I don't know. I'll just take you on face.

Q. Would it surprise you to know he's got offices in Santa Ana, Pasadena and Van Nuys?

A. Okay.

Q. Would that make him some kind of flake?

A. No, it doesn't. I'm always a little troubled when doctors start to lend their name out to offices and clinics and *they're not there.* It bothers me. Do I think the doctors themselves are unethical, no, but it troubles me quite honestly when doctors start to merchandise their names.

Also pertinent is the following passage from the prosecutor's redirect examination:

Q. Does the number of offices have any bearing on the quality of care that a doctor can render to his patients?

A. I think there are certainly doctors who can practice at multiple offices and see patients. In this case, there was — there were no medical

> records. *There's a question of whether the patient had ever been seen.*

(Emphasis added.)

Thus, both after cross examination and with an opportunity to clarify on redirect, Judge Altman returns to the same bottom line: the actual concern about Chein's credibility at the *Lopez* trial was not that he practiced out of many offices, but rather, that he had never actually examined the *Lopez* plaintiffs.

This clarification of the ultimate import of Judge Altman's testimony allows us to properly frame the materiality inquiry: Is the number of offices out of which a physician practices material to the question of whether he actually examined the patients about whom he testified? Any rational jury would respond in the negative.

The only evidence in the record that arguably supports the proposition that physicians practicing out of multiple offices are more likely than single office practitioners to lie about having examined their patients is Judge Altman's testimony that the former group is more likely to "run[ ] a personal injury mill." Judge Altman was neither a percipient nor an expert witness with regard to that question, and no rational jury would have thought otherwise.

Nor is Judge Altman's assertion such common knowledge that the *Chein* jury could have concluded, based on their own life experience, that the *Lopez* jury would have regarded Dr. Chein as more likely to lie if he practiced from more offices. Absent some competent evidence to that effect — for example, an expert on medical practice — a reasonable lay jury would not perceive any connection between the number of offices a doctor practices from and

his competence, general credibility, or likelihood to claim he has examined patients when he has not.

[9] Ultimately, it appears that the prosecution at Chein's perjury trial pursued a conviction for an immaterial falsehood — that he practiced out of only one office — because it was unable to prove a material one — that Dr. Chein had lied about whether he had actually examined the *Lopez* plaintiffs. Wise as he may be as a jurist, Judge Altman's testimony on the practices of the medical profession was simply insufficient to generate materiality where it did not exist.[7]

[10] Habeas relief is therefore warranted as to the office count.

D.

The University Count

[11] Finally, Chein was prosecuted for his response to an interrogatory concerning his education. He responded that he attended "American University School of Medicine, Florida, 1979-1980," when he in fact was enrolled in the American University of the Caribbean School of Medicine, which is located in the West Indies but has an office in Florida. (While enrolled at the University, Chein never actually attended classes in the West Indies, but instead did his hospital rotation in the United States.) The name of the school was

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[7] The California Court of Appeal's conclusion to the contrary is not reasonable. In the same way that an eye-witness' in-court identification is meaningless if the witness concedes on cross-examination that he had not been at the crime scene after all, Judge Altman's initial testimony must be analyzed in the context of the subsequent modification of his testimony. Judge Altman conceded on cross and redirect examination that the material issue at the *Lopez* trial was not the number of offices Chein had but rather whether he had actually examined the *Lopez* plaintiffs.

written incorrectly on the interrogatory response, and there was evidence both that offshore medical schools are less prestigious than domestic ones and that Chein had used the same erroneous name for the University on a resume, indicating that the error was purposeful. A rational trier of fact could have found that the interrogatory response was intentionally false beyond a reasonable doubt.

This interrogatory was propounded for the *Kancilia* case, which arose out of a dispute between Chein and Dr. Kancilia, a chiropractor, his business associate. Kancilia sued Chein, after the termination of their business agreement, for an accounting of funds. Additionally, there were allegations that Chein had committed fraud by hiding patient accounts. As a result of Chein's alleged wrongdoing, Kancilia asked for punitive damages.

[12] That the medical school from which Chein graduated has little pertinence to a dispute between business associates is evident. The business partner was a chiropractor; Chein was a doctor of medicine and a graduate of a residency program in physical medicine and rehabilitation at the University of Southern California. In a business dispute over money, it is extremely unlikely that medical credentials would be pertinent to credibility determinations, and, if they were, the fact that Chein graduated from an offshore medical school could not alone affect his credibility vis-à-vis that of Kancilia, a chiropractor, should credibility have become an issue.[8]

To fill this gap, the state's theory of materiality, at trial, on appeal, and here on habeas review — although not relied

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[8] If the § 2254(d)(1) prong of AEDPA applies, the California Court of Appeal's conclusion to the contrary was an unreasonable application of *Jackson*.

upon by the California Court of Appeal — is that by suing for fraud, and by claiming punitive damages, Kancilia placed Chein's credibility at issue, and that Chein's false answer could be used to show him to be generally untrustworthy. Although a number of fundamental defects plague this theory of criminal liability, we will state only the most obvious.

The materiality inquiry does not focus on whether the trier of fact's knowledge that a witness's statements are false would impact the proceedings, but rather, on whether the outcome of the proceedings could probably have been affected if the trier of fact had known the truth in lieu of what it was told.

In this case, the pertinent question is whether it is probable that the outcome of the *Kancilia* proceedings, a fraud and contract case between business associates, could probably have been influenced by the knowledge that Chein attended a medical school in the Caribbean, as opposed to a medical school in Florida.

The state's theory instead emphasizes the falsity of the statement actually made as a basis for impeaching the speaker's credibility, maintaining that the falsehood is material because knowledge that the statement was false could be a basis for disbelieving the speaker at trial. But perjury law aims to discourage false statements, not to encourage such statements for use to impeach credibility. California case law does recognize that falsehoods going to the credibility of witnesses can be material, *see, e.g.*, *People v. Gamble*, 87 Cal. Rptr. 333, 334-35 (Ct. App. 1970). But in *Gamble* and similar cases, a witness either impairs the credibility of another witness by making a false statement that renders that witness materially less credible than would the truth, or materially embroiders his own credibility by making a false statement. Such cases do not regard false statements as material to credibility simply because, at trial,

its very falsity, were it discovered, could be used for impeachment purposes. *See, e.g.*, *People v. Dunstan*, 211 P. 813, 816 (Cal. Ct. App. 1922).

The state's theory would largely eliminate the materiality element of perjury. Falsity can always be used for impeachment purposes if the truth is discovered, yet opposing litigants have no opportunity to exploit this tactic if there is no falsehood in the first instance. On the state's theory, that is, it might not matter what Chein lied about in his interrogatories, in deposition, or at trial. On that theory, *any* lie can be used for impeachment purposes in a fraud case if the lie is discovered, so *any* lie, including one having nothing to do with the issues in the case, would be material. California perjury law has not so abandoned the element of materiality.

[13] Thus, evidence showing that Chein lied in one interrogatory answer and that *Kancilia* was a fraud case where punitive damages were claimed was insufficient under *Jackson* to establish the materiality of an otherwise immaterial false statement beyond a reasonable doubt.

IV.

Conclusion

[14] As there was insufficient evidence under *Jackson* to sustain any of Chein's three counts of conviction, the district court erred in denying habeas relief.

REVERSED.

O'SCANNLAIN, Circuit Judge, dissenting, with whom RYMER, T. NELSON, RAWLINSON, and CLIFTON, Circuit Judges, join:

I respectfully dissent from the court's decision to grant Edmund Chein's habeas corpus petition based on its conclusion that there was insufficient evidence to convict him of perjury in state court. I do not believe that the State of California deprived Chein of his constitutional rights on these grounds.[1]

I

Chein was convicted of three separate counts of perjury, the "specialist" count, the "office" count, and the "university" count. I discuss the constitutional sufficiency of the evidence for each conviction in turn.

A

As an expert medical witness at a personal injury trial, Chein was asked the following under oath: "And your specialty, what would be the correct designation?" He answered, "Physical medicine and orthopedic surgery." While Chein's residency included some rudimentary training in orthopedic surgery, the actual title of his residency program and consequent speciality designation was "physical medicine and rehabilitation"—*not* orthopedic surgery. Under California law, a perjurious statement must be both false and material. Cal. Penal Code § 118 (defining perjury as when a person, under oath, "states as true any material matter which

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[1] Because I believe the standard of review in this case does not affect the outcome, I, too, express no opinion regarding the interplay between AEDPA and *Jackson v. Virginia*, 443 U.S. 307 (1979). *See* Maj. Op. 8554-56.

he or she knows to be false"). As to the falsity of this statement, the majority ultimately assumes what I believe to be self-evident: that a rational jury could conclude that Chein lied under oath by claiming such a nonexistent credential. *See* Maj. Op. 8560- 62.

I disagree with the majority's conclusion as to the materiality of that lie; specifically, whether a jury in a personal injury case might have been influenced by Chein's made-up speciality in orthopedic surgery when he "testified as an expert witness [to establish] that the plaintiffs would require orthopedic surgery." Maj. Op. 8562. The majority says no. But if two doctors gave me conflicting diagnoses about my need for invasive orthopedic surgery, I know I would be more inclined to trust the opinion of the actual orthopedic surgery specialist over the doctor who practiced physical medicine and rehabilitation. I believe that a rational jury could come to the same conclusion.

Under California law, the materiality of an allegedly perjurious statement is a question for the jury. *People v. Kobrin*, 903 P.2d 1027, 1033-34 (Cal. 1995). California's penal code provides specific detail about this requirement in § 123:

> It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.[2]

(Text continued on page 8578 [A-144])

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[2] The majority asserts that the last part of § 123, "might have been used to affect such proceeding," "seems not to be a definition of materiality but an *additional* requirement." Maj. Op. 8559 n.2 (emphasis in original). We have no power to decide how California should best interpret its own

law, so such a contention is plainly inappropriate given that the two most recent California cases on the subject specifically define the "materiality" element of perjury as "whether the statement or testimony 'might have been used to affect [the proceeding in or for which it was made].' " *Kobrin*, 903 P.2d at 1028 (quoting § 123) (brackets in original); *People v. Feinberg*, 60 Cal. Rptr. 2d 323, 329 (Cal. Ct. App. 1997). Indeed, in the very case at bar, the California Court of Appeal invoked this standard in rejecting Chein's sufficiency of the evidence claim.

The majority claims that *Kobrin*'s formulation is dicta. This is plainly untrue: *Kobrin* established that the question of materiality must be submitted to the jury, and the specific formulation of that requirement is clearly a valid holding of the court. Indeed, *People v. Wade*, 46 Cal. Rptr. 2d 645 (Cal. Ct. App. 1995), which the majority relies on to establish the "correct" materiality standard, is not even a perjury case at all, but a second degree murder case that *distinguished* California perjury jurisprudence. *See* Maj. Op. 8557. Now there's real dicta.

More importantly, the majority's analysis suggests that there is some material difference between the "could probably" and the "might" standard, and that only one or the other can apply to this case. *See* Maj. Op. 8558 (arguing that *Kobrin* did not "overrule earlier formulations of the materiality standard"). I do not believe this to be true, at least under California law. *See Feinberg*, 60 Cal. Rptr. 2d at 329 (stating that "[t]he test for whether a statement is material has been stated as whether the statement or testimony might have been used to affect the proceeding in or for which it was made or whether the statement could probably have influenced the outcome of the proceedings" (internal citations, alterations, and quotation marks omitted)).

Even if they are materially different standards, a "could probably" formulation must be more favorable to Chein than a "might" standard, and the jury's determination under the higher burden necessarily encompassed the lesser finding. In other words, when the jurors specifically found beyond a reasonable doubt that Chein's false statements *could probably* have affected the outcome, they perforce found that Chein's lies *might* have been used to such effect. Longstanding precedent establishes that when criminal "defendants [are] convicted under [a] heavier standard, they have no cause for complaint. The error [can] only work in their favor and [is] therefore, harmless." *United States v. Pheaster*, 544 F.2d 353, 362 n.3 (9th Cir. 1976); *see also United States v. Rea*, 532 F.2d 147, 149 (9th Cir. 1976) (refusing to find error in a case where "[a]ny ambiguity in the instructions could only have benefitted the

According to California law, a "person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Cal. Evid. Code § 720(a). Indeed, when challenged, "such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." § 720(a). Thus, Chein's qualifications, including the correct designation of his specialty, are threshold inquiries that must be established in order for him to testify. In other words, under California law, an expert witness's credentials are *inherently* material to his or her testimony.

This is not some "novel per se rule." Maj. Op. 8563 n.3. Rather, it simply reflects the nature of perjury, under California law, in the context of courtroom testimony. California is generally free to enact rules of evidence establishing when and how witnesses are qualified to testify at trial, and to bar them from testifying otherwise. For example, if a witness is required to have personal knowledge of events in order to testify about them, the fact that he or she did not witness an entire conversation would be grounds for excluding some portion of his or her testimony about it. Likewise, California law required Chein to possess medical credentials in order to offer his expert opinion in the first place—but he lied about the extent of those credentials, and

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defendant, because some jurors might have had an erroneous, but more stringent, view of the government's burden of proof").

For these reasons, I must reject the majority's implication that the "might" standard is not an equally valid formulation of materiality under California law. And to the extent it makes any difference at all, I generally employ this baseline materiality standard enunciated in § 123 and reiterated in *Kobrin* and *Feinberg*.

hence about his very ability to testify at all.[3] *See* Cal. Evid. Code § 720.

Indeed, under California law, Chein would have been precluded from offering his opinion if he refused to specify his qualifications, so a rational jury should be able to conclude that lying about those same qualifications was material. *See* Law Revision Commission Comment to Cal. Evid. Code § 802 (1995) (

> Under existing law, where a witness testifies in the form of pinion not based upon his personal observation, he assumed facts upon which his opinion is based must be stated in order to show that the witness has some basis for forming an intelligent opinion and to permit the trier of fact to determine the applicability of the opinion in light of the existence or nonexistence of such facts.

(citing *Eisenmayer v. Leonardt*, 84 P. 43 (Cal. 1906) and *Lemley v. Doak Gas Engine Co.*, 180 P. 671 (Cal. 1919))). The asserted "fact" that Chein was a specialist in "orthopedic

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[3] It is undisputed that "Chein testified as an expert witness [to establish] that the plaintiffs would require orthopedic surgery." Maj. Op. 8562. At the very least, then, if Chein admitted that he had *not* received sufficient training to qualify as an orthopedic surgery specialist, the trial court probably would not have abused its discretion if it determined that he could not testify at least as to that issue. The majority counters that "[t]here is no basis" to conclude that Chein would have been barred from testifying had the trial court known his actual credentials. Maj. Op. 8563 n.3. But this only demonstrates a fundamental misunderstanding of California perjury law, for whether there is any evidence to suggest that a false statement *actually* may have affected the outcome of a case is irrelevant. Cal. Penal Code § 123 ("It is no defense to a prosecution for perjury that the . . . false statement . . . did not, in fact, affect the proceeding in or for which it was made.").

surgery" must have been at least *one* of his "bas[e]s for forming an intelligent opinion," *id.*, of the orthopedic injuries sustainedby the *Lopez* plaintiffs. Accordingly, the jury was *entitled* to make its determination "in light of the existence or nonexistence" of that asserted specialty. *Id.* California law also extends the scope of cross-examination in this context to allow an expert to "be fully cross-examined as to . . . his or her qualifications." Cal. Evid. Code § 721(a). Thus, Chein's lie prevented both the jury and the opposing party from determining a fact that each had the statutory right to consider.

Furthermore, as I understand it, the majority's interpretation of California perjury law would seem to allow Chein, with impunity, also to have falsely testified that he was a recipient of the Nobel Prize in Medicine for his work in orthopedic surgery.[4] For this false, though hugely persuasive credential would only have conferred an enhanced ability to determine "the precise *type* of surgical procedure" that would be necessary, and would not be squarely relevant to the majority's critically narrow question of who was better qualified to determine *whether* the plaintiffs might have "a need for future [orthopedic] surgery." Maj. Op. 8564. This is difficult to accept.

Perhaps, then, this is why the majority is willing to concede that a falsely claimed Nobel Prize in orthopedic surgery "*could* have been material." Maj. Op. 8564 n.4 (emphasis in original). But if that is true, it is for a state court jury—not a federal appellate court in a habeas corpus case—to determine whether *Chein's* false advanced credential was material. We have no businesses determining, as a matter of

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[4] The simple fact that such a lie would be so easy to detect would have no bearing on a later perjury charge under California law. *See* Cal. Penal Code § 118.

state law, that a physician with a Nobel Prize in orthopedic surgery possesses a material expert qualification, while a physician with a recognized specialty in orthopedic surgery plainly does not. In other words, the majority has simply chosen the kind of advanced orthopedic credential it—rather than the jury—finds impressive. I believe such an approach is unwarranted.

This is particularly true given that the expert witnesses at Chein's perjury trial emphasized the hard work, dedication, and years of advanced training and education it takes to become a "normal, albeit specialist doctor" in orthopedic surgery, as the majority somewhat cavalierly puts it. *Id.* If nothing else, these witnesses demonstrated that achieving such an advanced credential means a whole lot to them, and that it is certainly an accomplishment worthy of true "recognition . . . in a career in medicine." *Id.* Nevertheless, the majority says no reasonable person could conclude that such training could potentially have any persuasive value in the *Lopez* case. With respect, I do not believe California has set so high a bar for perjury convictions.

The majority heavily emphasizes that the defendants in the *Lopez* case argued that the plaintiffs never suffered any injury at all. *See* Maj. Op. 8564-65. But that has no bearing in this context. Whatever the defense's legal theory of the case, the *Lopez* plaintiffs had to establish the fact of their injuries to recover for them in their tort suit. One of the particular injuries they claimed was orthopedic in nature. Maj. Op. 8562 ("Chein testified as an expert witness that the plaintiffs would require orthopedic surgery."). So if the jury did not believe Chein's assessment that the plaintiffs had actually suffered those injuries, their recovery would have been reduced accordingly. In other words, regardless of the defense's position, the plaintiffs had to establish that they actually suffered the *orthopedic* injuries they claimed in order to receive all of the compensation they sought, and any

change in the amount of compensation they may have recovered necessarily affects the outcome of the proceeding.

Chein may have lied believing that his testimony would be excluded if he were not an orthopedic surgeon. Or, he may simply have presented a false credential (one that the opposing expert possessed) to bolster his medical opinion testimony. There is also a fair probability that reasonable jurors might specifically consider Chein's uncorrected lie in making their ultimate determination, at least as to compensation. In any case, a reasonable person could conclude that Chein's false statement "might have been used to affect [the *Lopez*] proceeding." Cal. Penal Code § 123.

Therefore, I must respectfully dissent from the majority's conclusion that no rational trier of fact could believe that Chein's "specialist" testimony was material under California law.

B

The majority also concludes that the jury did not have sufficient evidence upon which to convict Chein of "the office count." Chein testified that he had only one office, when in fact he had several. Here, the majority clearly concedes that a rational trier of fact could determine that the testimony was false, *see* Maj. Op. 8565-66, but mistakenly holds that no rational jury could have found the essential element of materiality beyond a reasonable doubt.

California courts have interpreted the materiality provision of perjury broadly. For example, "[f]alse testimony *even unrelated to an issue* but which has the tendency to impeach the credibility of a witness who testified on a material issue may be perjurious" under the materiality requirement. *People v. Gamble*, 87 Cal. Rptr. 333, 335 (Cal. Ct. App. 1970) (emphasis added). Additionally, false

"statements not directly related to an issue may also be material where they have a tendency to influence the trier of fact on an issue."[5] *Id.*

At least one witness at Chein's trial, Judge Robert Altman, testified that the maintenance of multiple offices could negatively affect the persuasiveness of Chein's qualifications because it could lead to the inference that Chein ran "a [personal injury] mill and that the doctor isn't just in medicine just making money and that the doctor is handling all personal injuries and workmen's compensation and then churning cases through the courtroom." This is a simple credibility inference that need not be established by an expert witness, so the fact that Judge Altman was not a medical doctor does not affect the admissibility of his testimony. Judge Altman was a trial judge who presumably adjudicated many personal injury cases involving numerous medical experts and their relative credibility as ultimately evidenced by verdicts. Therefore, his lay opinion testimony was admissible under California law as "[r]ationally based on the perception of the witness." Cal. Evid. Code § 800(a).

I sincerely doubt that Judge Altman's "personal injury mill" inference would "in fact, affect the proceeding in or for which it was made." Cal. Penal Code § 123. Nevertheless, a rational jury could believe that the false statement "might

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[5] Because these statements demonstrate that California law does not confine materiality to any one specific issue in a case, I must reject the majority's attempt to limit our inquiry to the very narrow question of whether the "number of offices out of which a physician practices [is] material to the question of whether he actually examined the patients about whom he testified." Maj. Op. 8570-71. The jury was free to frame the issues its own way. It could even determine that Chein's lie about his multiple offices was not "directly related to an issue" in the case at all, but merely had "a tendency to influence the trier of fact" in any aspect of its decision. *Gamble*, 87 Cal. Rptr. at 335.

have been used to affect [the *Lopez*] proceeding," § 123, because I believe that a rational juror could conclude that Chein's false testimony, though perhaps "unrelated to an issue . . . ha[d] the tendency to impeach the credibility of a witness who testified on a material issue."[6] *Gamble*, 87 Cal. Rptr. at 335. Chein's false testimony also may rationally be understood at least to have had a "tendency to influence the trier of fact on [the] issue" of Chein's qualification as a credible medical expert. *Id.* Therefore, I must respectfully dissent from the majority's conclusion that no reasonable jury could have found Chein's lie about his offices material beyond a reasonable doubt under California law.

C

Chein's interrogatory testimony regarding the medical school he attended presents a more difficult question, and one that may hinge on whether or not AEDPA deference applies. Nevertheless, for purposes of this dissent, I need not address it: Because I believe that there were at least two clearly sustainable perjury convictions, and because there is no suggestion that Chein's sentence would have been different if he had been convicted only of these two perjury counts, Chein's incarceration remains constitutionally valid. *See United States v. Barron*, 172 F.3d 1153, 1160 (9th Cir. 1999) (en banc).

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[6] While this statement may generally refer to one witness falsely disparaging the credibility of another, I do not believe this is distinguishable from a witness falsely bolstering his or her own credibility. And there is no doubt that Chein testified on a material issue.